

5-11-2011

# A & B Irrigation v. Spackman Clerk's Record v. 4 Dckt. 38191

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## Recommended Citation

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38191 (consolidated)

IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

A&B IRRIGATION, AMERICAN FALLS RESERVOIR DISTRICT #2, )  
BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT )  
NORTHSIDE CANAL COMPANY, TWIN FALLS CANAL )  
COMPANY, UNITED STATES OF AMERICA, BUREAU OF )  
RECLAMATION, )  
Petitioners-Respondents, )  
And ) *and*  
IDAHO DAIRYMEN'S ASSOCIATION, INC. )  
Cross-Petitioner-Respondent, )  
v. )  
GARY SPACKMAN, in his capacity as Interim Director of the Idaho )  
Department of Water Resources, and the IDAHO DEPARTMENT )  
OF WATER RESOURCES, )  
Respondents-Respondents on Appeal, )  
And )  
IDAHO GROUND WATER APPROPRIATORS, INC., )  
Intervenor-Appellant, )  
And ) *and*  
THE CITY OF POCA TELLO, )  
Intervenor-Respondent. )

Appealed from the District Court of the 5th  
Judicial District for the State of Idaho, in and  
for Gooding County  
Hon. John Melanson District Judge

Randall Budge – Candice McHugh – RACINE OLSON

Sarah Klahn – WHITE JANKOWSKI – Dean Tranmer

Attorneys for Appellants

Garrick Baxter/Chris Bromley - IDAHO ATTORNEY GENERAL'S OFFICE

John Simpson/Travis Thompson/Paul Arrington – BARKER ROSHOLT SIMPSON

Attorney for Respondent

Filed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
Clerk

By \_\_\_\_\_ Deputy

2020 1924  
13

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

\*\*\*\*\*

IN THE MATTER OF THE DISTRIBUTION OF )  
WATER TO VARIOUS WATER RIGHTS HELD )  
BY OR FOR THE BENEFIT OF A&B )  
IRRIGATION DISTRICT, AMERICAN FALLS )  
RESERVOIR DISTRICT # 2, BURLEY IRRIGATION )  
DISTRICT, MILNER IRRIGATION DISTRICT, )  
NORTSIDE CANAL COMPANY, AND TWIN )  
FALLS CANAL COMPANY, )

\_\_\_\_\_  
A&B IRRIGATION, AMERICAN FALLS )  
RESERVOIR DISTRICT # 2, BURLEY IRRIGATION )  
DISTRICT, MILNER IRRIGATION DISTRICT, )  
NORTSIDE CANAL COMPANY, TWIN FALLS )  
CANAL COMPANY, UNITED STATES OF )  
AMERICA, BUREAU OF RECLAMATION, )

Petitioners-Respondents, )  
And )  
IDAHO DAIRYMEN'S ASSOCIATION, INC. )  
Cross-Petitioner-Respondent, )  
v. )

GARY SPACKMAN, in his capacity as Interim )  
Director of the Idaho Department of )  
Water Resources, and the IDAHO )  
DEPARTMENT OF WATER RESOURCES, )

Respondents-Respondents on Appeal, )  
And )

IDAHO GROUND WATER APPROPRIATORS, )  
INC., )  
Intervenor-Appellant, )

And )  
THE CITY OF POCA TELLO, )  
Intervenor-Respondent. )

Supreme Court No. # 38191-92-93-94-2010  
Clerk's Certificate of Appeal

**COPY**

Appeal from the District Court of the 5<sup>th</sup> Judicial District of the State of  
Idaho, in and for the County of Gooding

\*\*\*\*\*

HONORABLE JOHN MELANSON DISTRICT JUDGE

\*\*\*\*\*

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	APER	CYNTHIA	Plaintiff: A & B Irrigation District Appearance John A Rosholt Barry Wood
	APER	CYNTHIA	Plaintiff: American Falls Reservoir Appearance C. Tom Arkoosh Barry Wood
	APER	CYNTHIA	Defendant: Tuthill, David Appearance Phillip J Rassier Barry Wood
	APER	CYNTHIA	Defendant: Idaho Department Of Water Resources Appearance Phillip J Rassier Barry Wood
		CYNTHIA	Filing: R2 Appeal or petition for judicial review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Arkoosh, C. Tom (attorney for American Falls Reservoir) Receipt number: 0003795 Dated: 9/11/2008 Amount: \$88.00 (Check) For: A & B Irrigation District (plaintiff) Barry Wood
	APER	CYNTHIA	Plaintiff: Burley Irrigation District, Appearance John A Rosholt Barry Wood
	APER	CYNTHIA	Plaintiff: Milner Irrigation District, Appearance John A Rosholt Barry Wood
	APER	CYNTHIA	Plaintiff: Minidoka Irrigation District, Appearance W Kent Fletcher Barry Wood
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	APER	CYNTHIA	Plaintiff: Twin Falls Canal Company, Appearance John A Rosholt Barry Wood
9/12/2008	CHJG	CYNTHIA	Change Assigned Judge John Melanson
	ORDR	CYNTHIA	Order of Reassignment John Melanson
9/19/2008	NOAP	CYNTHIA	Notice Of Appearance Barry Wood
9/25/2008	MISC	CYNTHIA	Petitioners Statement of Initial Issues John Melanson
9/26/2008	NOTC	CYNTHIA	Notice of Petition for Reconsideration John Melanson
	NOAP	CYNTHIA	Notice Of Appearance John Melanson
9/30/2008		CYNTHIA	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than \$300, Not more than \$1000 Paid by: City Of Pocatello, (other party) Receipt number: 0004082 Dated: 10/1/2008 Amount: \$58.00 (Check) For: City Of Pocatello, (other party) John Melanson
10/1/2008	APER	CYNTHIA	Other party: City Of Pocatello, Appearance A. Dean Tranmer John Melanson
10/2/2008	APER	CYNTHIA	Other party: Idaho Dairymen's Association, Inc Appearance Michael C Creamer John Melanson

(e)

Date	Code	User	Judge
10/2/2008		CYNTHIA	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than \$300, Not more than \$1000 Paid by: Creamer, Michael C (attorney for Idaho Dairymen's Association, Inc) Receipt number: 0004094 Dated: 10/2/2008 Amount: \$58.00 (Check) For: Idaho Dairymen's Association, Inc (other party)
10/10/2008	ORDR	CYNTHIA	Order Staying Petition until Further order of the Court
10/15/2008	HRSC	CYNTHIA	Hearing Scheduled (Oral Argument on Appeal 02/10/2009 01:30 PM)
10/16/2008	NOTC	CYNTHIA	Notice of Agency Order Denying Petition for Reconsideration
10/17/2008	ORDR	CYNTHIA	Procedural Order Governing Judicial Review of Agency Decision by District Court
10/20/2008	CONT	CYNTHIA	Continued (Oral Argument on Appeal 03/31/2009 01:30 PM)
10/24/2008	ORDR	CYNTHIA	Order Setting Scheduling Conference
11/7/2008		AMYA	Filing: R2 Appeal or petition for judicial review, or cross-appeal or cross-petition, from Commission Board/ or body to the District Court Paid by: Capital Law Receipt number: 0004571 Dated: 11/7/2008 Amount: \$88.00 (Check) For: A & B Irrigation District (plaintiff)
11/12/2008	APER	CYNTHIA	Plaintiff: United States Department Of Natural Resources Appearance David W Gehlert
11/21/2008	MISC	CYNTHIA	Petitioner's Statement of Issues (United States)
11/24/2008	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 11/24/2008 01:30 PM) scheduling conference
	CMIN	CYNTHIA	Court Minutes Hearing type: Hearing Scheduled Hearing date: 11/24/2008 Time: 1:30 pm Court reporter: Maureen Newton Audio tape number: DC 08-12
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11/26/2008		CYNTHIA	Notice Of Hearing
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	MISC	CYNTHIA	IGWA's Objection to the Agency Record
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1/26/2009	MISC	CYNTHIA	US Unopposed Motion to Reset Briefing Schedule

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2/6/2009	NOTC	CYNTHIA	Notice of Lodging of Agency Record with District Court	John Melanson
3/18/2009	MOTN	CYNTHIA	Petr Surface Water Coalitions Unopposed Motion to Reset Briefing Schedule	John Melanson
3/19/2009	ORDR	CYNTHIA	Third Amended Scheduling Order	John Melanson
4/3/2009	MISC	CYNTHIA	Petitioner US Opening Brief	John Melanson
	MISC	CYNTHIA	Surface Water Coalition's Joint Opening Brief	John Melanson
4/30/2009	MISC	CYNTHIA	Volume II begins	John Melanson
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	MISC	CYNTHIA	Respondent Pocatello's Brief	John Melanson
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7/24/2009	ORDR	CYNTHIA	Order on Petition for Judicial Review	John Melanson
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10/9/2009	MISC	CYNTHIA	City of Pocatello's Opening Brief in Support of Petition for Rehearing	John Melanson
10/13/2009	MISC	CYNTHIA	Ground Water Users Opening Brief on Rehearing	John Melanson
10/23/2009	ORDR	CYNTHIA	Supreme Court Order Assigning Judge Melanson	John Melanson
11/6/2009	MISC	CYNTHIA	Surface Water Coalitions Response to IGWA's and City of Pocatello Petition for Rehearing	John Melanson
11/9/2009	MISC	CYNTHIA	IDWR Response Brief on Rehearing	John Melanson
11/30/2009	REPL	CYNTHIA	Ground Water Users Reply on Rehearing	John Melanson
	REPL	CYNTHIA	City of Pocatello's Reply Brief in Support of Petition for Rehearing	John Melanson
12/15/2009	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 02/02/2010 01:30 PM) TO BE HELD AT SRBA - TWIN FALLS (telephone okay)	John Melanson
	ORDR	CYNTHIA	Order Setting Oral Argument on Petition for Rehearing	John Melanson
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3/11/2010	MISC	CYNTHIA	Surface Water Coalitions Objection to ORder staying decision
3/17/2010	MISC	CYNTHIA	Ground Water Users/Pocatello's Response to SWC Objection to Order Staying Decision
3/25/2010	ORDR	CYNTHIA	Order Overruling Objection to Order Staying Decision
3/29/2010	MOTN	CYNTHIA	Unopposed Motion for Extension of Time to File Order on Remand
4/19/2010	NOTC	CYNTHIA	Notice of Substitution of Counsel
	APER	CYNTHIA	Defendant: Tuthill, David Appearance Garrick Baxter
	APER	CYNTHIA	Defendant: Idaho Department Of Water Resources Appearance Garrick Baxter
5/13/2010	MOTN	CYNTHIA	City of Pocatello and Ground Water Users motion for Stay and to Augment Record
	MEMO	CYNTHIA	City of Pocatello and Ground Water Users Memorandum in Support of Motion for Stay...
5/18/2010	MISC	CYNTHIA	Volume IV Begins
5/19/2010	RESP	CYNTHIA	IDWR Response To IGWA and Pocatello Motion for Stay
	AFFD	CYNTHIA	Affidavit of Chris Bromley
5/27/2010	MOTN	CYNTHIA	Motion to Extend Deadline to Respond to Motion to Stay
5/28/2010	MISC	CYNTHIA	City of Pocatello and Ground Water Users Response to Motion to Extend Deadline
	ORDR	CYNTHIA	Order
6/3/2010	MISC	CYNTHIA	Surface Water Coalition's Response to IGWA/City of Pocatello Motion to Stay
6/8/2010	MISC	CYNTHIA	City of Pocatello and Ground Water Users Reply in Support of Motion to Stay and Augment...
	AFFD	CYNTHIA	Affidavit of Sarah Klahn
6/22/2010	MISC	CYNTHIA	Volume V Begins
6/23/2010	ORDR	CYNTHIA	Order Denying Motion for Stay and to Augment Record
7/23/2010	NOTC	CYNTHIA	Notice of Status Conference
	HRSC	CYNTHIA	Hearing Scheduled (Hearing Scheduled 08/06/2010 10:00 AM) Video teleconference from Idaho Water Ctr - Boise



Date	Code	User	Judge
8/6/2010	CMIN	CYNTHIA	Court Minutes - via video conferencing @ IDWR - John Melanson Boise, Idaho Virginia Bailey - Reporter Julie Murphy - Clerk Status Conference 10:00 a.m.
	ADVS	CYNTHIA	Matter Taken Under Advisement John Melanson
8/9/2010	HRHD	CYNTHIA	Hearing result for Hearing Scheduled held on 08/06/2010 10:00 AM: Hearing Held Video teleconference from Idaho Water Ctr - Boise John Melanson
8/23/2010	ORDR	CYNTHIA	Order on Petitions for Rehearing. John Melanson
8/26/2010	MOTN	CYNTHIA	Motion to Clarify/Motion for Reconsideration John Melanson
9/3/2010	MOTN	CYNTHIA	Surface Water Coalitions Motion for Clarification John Melanson
9/9/2010	ORDR	CYNTHIA	Amended Order on Petitions for Rehearing John Melanson
10/21/2010	APSC	CYNTHIA	Appealed To The Supreme Court (IDWR) John Melanson Document sealed
	STAT	CYNTHIA	STATUS CHANGED: Inactive John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Baxter, Garrick (attorney for Idaho Department Of Water Resources) Receipt number: 0003849 Dated: 10/21/2010 Amount: \$.00 (Cash) For: Idaho Department Of Water Resources (defendant) John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (Surface Water Coalition) John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Arkoosh, C. Tom (attorney for American Falls Reservoir) Receipt number: 0003860 Dated: 10/21/2010 Amount: \$101.00 (Check) For: A & B Irrigation District (plaintiff), American Falls Reservoir (plaintiff) and Burley Irrigation District, (plaintiff) John Melanson
		CYNTHIA	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: A & B Irrigation District Receipt number: 0003861 Dated: 10/21/2010 Amount: \$200.00 (Check) John Melanson
		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: City of Pocatello Receipt number: 0003863 Dated: 10/21/2010 Amount: \$.00 (Cash) For: City Of Pocatello, (other party) John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (City of Pocatello) John Melanson
	APSC	CYNTHIA	Appealed To The Supreme Court (IGWA) John Melanson
10/22/2010	APER	CYNTHIA	Other party: Idaho Ground Water Users, Appearance Randall C. Budge John Melanson

Date	Code	User	Judge
10/22/2010		CYNTHIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Budge, Randall C. (attorney for Idaho Ground Water Users,) Receipt number: 0003875 Dated: 10/22/2010 Amount: \$101.00 (Check) For: Idaho Ground Water Users, (other party)
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11/22/2010	ORDR	CYNTHIA	OrderSuspending Appeal (Clerk of the Court)
11/24/2010	MISC	ROSA	Idaho Ground Water Appropriattors, Inc's and City of Pocatello's Request to Amend Caption
11/30/2010	JDMT	ROSA	Judgment Nunc Pro Tunc
	ORDR	ROSA	Order Amending Caption
	STAT	ROSA	STATUS CHANGED: Closed
12/2/2010	STAT	CYNTHIA	STATUS CHANGED: inactive
12/20/2010	MISC	JULIE	Idaho Ground Water's Amended Notice of Appeal
	MISC	CYNTHIA	City of Pocatello Amended Notice of Appeal
12/23/2010	ORDR	CYNTHIA	Supreme Court ORder Adopting District Court Order (re: Caption)
1/27/2011	NOTC	CYNTHIA	IGWA Second Amended Notice of Appeal

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

GOODING COUNTY CLERK

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

BY: [Signature]  
DEPUTY

A&B IRRIGATION DISTRICT, AMERICAN )  
FALLS RESERVOIR DISTRICT #2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY and TWIN FALLS CANAL )  
COMPANY, )

Petitioners, )

vs. )

GARY SPACKMAN, in his capacity as Interim )  
Director of the Idaho Department of Water )  
Resources, and THE IDAHO DEPARTMENT OF )  
WATER RESOURCES, )

Respondents. )

IN THE MATTER OF DISTRIBUTION OF )  
WATER TO VARIOUS WATER RIGHTS )  
HELD BY OR FOR THE BENEFIT OF A&B )  
IRRIGATION DISTRICT, AMERICAN FALLS )  
RESERVOIR DISTRICT #2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY and TWIN FALLS CANAL )  
COMPANY )

CASE NO. CV-2008-551

**CITY OF POCA TELLO'S OPENING BRIEF  
IN SUPPORT OF PETITION FOR REHEARING**

On Appeal from the Idaho Department of Water Resources

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Honorable John M. Melanson, Presiding

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On July 24, 2009, the Court issued its Order on Petition for Judicial Review (“July 24, 2009 Order”) in this matter. The City of Pocatello (“Pocatello”) submitted its Petition for Rehearing on August 14, 2009. Pursuant to the Court’s August 25, 2009 scheduling order on rehearing, Pocatello hereby submits its Opening Brief in Support of Petition for Rehearing.

### INTRODUCTION

In considering the Surface Water Coalition (“SWC”) challenge in this matter, this Court’s July 24, 2009 Order on Petition for Judicial Review decided that the Director committed an abuse of discretion by ordering a “replacement water plan” in lieu of certain procedures provided in the Conjunctive Management Rules (“CMR”):

This is not a situation where the replacement water ordered is consistent with the timing and in the quantities authorized under the decreed or licensed rights, leaving no room for disagreement. Rather this is [a] situation where the Director has extensively applied the provisions of the CMR for purposes of making a material injury analysis ultimately resulting in adjustments in the timing of delivery and in the quantities of water authorized under the decrees or licenses. The Court sees no distinction between the “replacement water plans” ordered in this case and a mitigation plan . . . .

. . . .

*Once a mitigation plan has been proposed*, the Director must hold a hearing as determined necessary . . . .

. . . .

. . . While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

July 24, 2009 Order at 29, 30 (underline emphases added, italic emphases in original).

The Court should clarify its determination that the Director’s procedure violated due process to explain that the remaining process to be afforded to participants is a hearing *solely* on the issue of the reliability of the juniors’ proffered replacement water pursuant to CMR 43.

When a mitigation plan filed under CMR 43 is contested, there are two appropriate categories of issues to be resolved at the hearing: what amount of water is necessary to avoid injury, and has the junior ground water user acquired an adequate supply for that purpose? The first question (what amount of water is required to avoid injury) is the very same issue determined at the trial conducted by Hearing Officer Schroeder January 18 through February 5, 2008 ("2008 Hearing"). The second question (have the junior ground water users acquired an adequate supply of water to avoid injury) has not been the subject of a contested case hearing, although a hearing of sorts was conducted by the Director in June of 2007 regarding Idaho Groundwater Appropriators, Inc.'s (referred to herein as "Ground Water Users") proffered 2007 replacement supplies. *See* July 24, 2009 Order at 28 (discussion and citations to the record regarding this "limited hearing").

The Court should clarify its July 24, 2009 Order to explain that the 2008 Hearing on appeal of the Director's May 2, 2005 Amended Order and subsequent Interim Orders afforded all participants sufficient due process regarding the proper amount of water required to avoid injury to seniors. Although the hearing was conducted in the context of review of the Director's injury finding, the question is the same as that raised in a contested CMR 43 matter. To satisfy due process, any future CMR 43 hearing regarding the Ground Water Users' replacement supplies should be limited to the question of whether the Ground Water Users have obtained adequate replacement water to satisfy the amounts required by the July 24, 2009 Order in this matter. The SWC has a right to a hearing on the adequacy of the replacement supplies acquired by the Ground Water Users, but not to revisit the determination of injury made at the 2008 Hearing.

## ARGUMENT

**A. Under CMR 43, participants must first be afforded a hearing on the Director's determination of injury which has already occurred in this case.**

As the Court noted in its July 24, 2009 Order, the Director properly declined the SWC's invitation to simply require delivery of their decreed amounts (which, in the words of the Court, would leave "no room for disagreement" regarding the amounts of replacement water required) and properly chose instead to make an analysis of material injury, and the concomitant replacement supplies required based on the CMR and applicable case law. Because "shut and fasten" administration of junior water rights, irrespective of actual need, is *not* the law in Idaho, any determination of injury made by the Idaho Department of Water Resources ("IDWR" or "Department") must involve a hearing to satisfy due process for juniors who may be required to provide replacement water.<sup>1</sup> By the same token, as this Court found in its July 24, 2009 Order, seniors must have the opportunity to challenge, upon a final determination of the Department's injury findings, the sufficiency of the juniors' proffered replacement water. However, in this case, a CMR 43 hearing regarding the Ground Water Users' replacement supplies does not constitute an opportunity for the SWC to revisit the injury determination already made through the 2008 Hearing.<sup>2</sup> That issue has already been determined, and under the doctrine of res

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<sup>1</sup> As described in Ground Water Users' Opening Rehearing Brief, Idaho law also requires a hearing prior to deprivation of vested property rights. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). As such, the Court must also resolve whether the Director can order curtailment (or the provision of replacement water) prior to a hearing on the merits of the seniors' delivery call.

<sup>2</sup> Since 2005, the SWC has sought delivery of its water rights pursuant to the face of its licenses and/or decrees. In doing so, SWC has disregarded fundamental principles of Idaho water law by ignoring the requirements of beneficial use and of satisfying Idaho constitutional standards regarding public interest, waste, efficient diversion, reasonableness and maximum and optimum use. See Idaho Const. art. XV, §§ 1, 3, 5, 7. To date, virtually every court and deliberative body to consider this draconian view of Idaho water law—which effectively reduces a water right to a priority date without more—has rejected the SWC's arguments out of hand. See, e.g., *American Falls Reservoir Dist. No. 2 v. Idaho Dep't Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007) ("AFRD#2"); July 24, 2009 Order; Hearing Officer Schroeder's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* of April 29, 2008; Director's *Final Order Regarding the Surface Water Coalition Delivery Call* of September 5, 2008; Director's *Order Denying Surface Water Coalition's Motion for Partial Summary Judgment* of May 31, 2006; Director's *Amended Order* of May 2, 2005.

judicata, which has been applied to administrative determinations in Idaho. As the Supreme Court found:

The doctrine of **res judicata** applies to **administrative** proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of **res judicata** was as follows:

We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.

The 'sameness' of a cause of action for purposes of application of the doctrine of **res judicata** is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

*Sagewillow, Inc. v. Idaho Dep't of Water Resources*, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (emphasis added).

In the context of the captioned matter, the Director properly made a preliminary determination of injury to the calling water right. It is the duty of the Director to administer water rights and curtail juniors only when necessary to supply the rights of a senior, and the Director is authorized to acquire additional information as needed to achieve administration. Idaho Code §§ 42-607, 42-606. Exercise of this administrative discretion is consistent with Idaho's constitutional principles of beneficial use without waste, reasonable use in the public interest, and maximum and optimum utilization. Idaho Const. art. XV, §§ 1, 3, 5, 7. To meet these constitutional requirements, water administration officials have an obligation to look to more than the paper decree in administering water rights, and must first determine need as a part



of injury.<sup>3</sup> The 2008 Hearing afforded all parties the opportunity to contest the injury determination made by the Director; all that remains is the question of whether the juniors' replacement supplies are adequate.

**B. Although as discussed *supra*, the intent of the Court's July 24, 2009 Order appears to be consistent with Idaho law, clarification of the July 24, 2009 Order regarding subsequent hearings under CMR 43 in the captioned matter is necessary to facilitate actions on remand is necessary.**

Because the Director's preliminary determinations regarding the magnitude of injury (as contained in the May 2, 2005 Amended Order) were tested via the 2008 Hearing, the Court should clarify its July 24, 2009 Order to state that the only error on the part of the Director in this regard was his failure to hold a CMR 43 hearing regarding the adequacy of the juniors' proffered replacement water. As the Court found in its July 24, 2009 Order, there is no distinction between "replacement water plans" and mitigation plans. In *AFRD#2*, the Idaho Supreme Court found that by ordering that juniors provide "replacement water" to replace injurious ground water depletions, the Director's action in response to the delivery call was timely. *AFRD#2*, 143 Idaho at 875, 154 P.3d at 446. The *AFRD#2* Court went on to note that "[i]ncident to the [Director's May 2, 2005 Amended Order] the parties were entitled to a hearing." *Id.* In 2007, at the time the Court resolved the facial constitutional challenge to the CMR brought by the SWC, the timing and—importantly, for purposes of this petition on rehearing—the scope of the hearing were still in question.<sup>4</sup>

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<sup>3</sup> A senior appropriator, "regardless of the amount of their decreed right", is not entitled to "the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.5, 546 P.2d 382, 390 n.5 (1976); Idaho Code § 42-220. See also *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 395-96, 283 P. 522, 525-26 (1929) (an appropriator is entitled only to the amount necessary for beneficial use).

<sup>4</sup> The *AFRD#2* Court noted: "Although both IGWA and American Falls exercised their right to a hearing and one was set, American Falls filed this action with the district court on August 15, 2005, before the hearing could be held. Subsequently, American Falls requested stays and continuances in the hearing schedule, one of which requested that the hearing be reset to no sooner than June 15, 2006. It appears that American Falls preferred to have its case heard

As this Court noted in the July 24, 2009 Order IDWR held a hearing from January 18 to February 5, 2008 regarding the Director's determination of injury. July 24, 2009 Order at 7. The Director's determinations in the May 2, 2005 Amended Order regarding the magnitude of injury to the SWC's water rights caused by junior ground water pumping were affirmed by the Hearing Officer and have not been disturbed at any point on appeal. *Id.* at 7-8. Just as this Court found no distinction between replacement water plans and mitigation plans, there is no difference in this case between the findings that resulted from the 2008 Hearing regarding magnitude of injury and the findings called for under CMR 43—the amount of replacement water necessary to avoid injury to seniors. The only thing that remains, therefore, at a CMR 43 hearing is the opportunity for the SWC test the adequacy of the juniors' proffered replacement supplies.

### CONCLUSION

As described above, Idaho law does not require a junior to simply obtain replacement water in response to the Department's initial order in a delivery call. By the same token, once the amount of injury is determined, the senior may have a legitimate basis to raise issues with the adequacy of the replacement supply obtained by the juniors. In this matter, the parties have been accorded the opportunity for a hearing regarding the first inquiry: was the Director's determination regarding the magnitude and amount of the SWC injury due to ground water pumping correct? To satisfy CMR 43, the next step is to have a hearing on the adequacy of the mitigation supplies to be provided.

THEREFORE, Pocatello respectfully requests that the Court now clarify its holding on page 30 of this Court's July 24, 2009 Order on Petition for Judicial Review, to include the following clarifying language (underlined):


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outside of the administrative process and went to great lengths, first to remove the case from the administrative process and second, to delay the hearing." *Id.*


While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users. For procedural purposes, the hearing held in this matter met the requirements of the CMR and due process insofar as it provided the opportunity for a hearing on the Director's injury finding; prospectively, in order to provide all participants with due process and an opportunity to be heard on the issue of replacement water, IDWR may hold a hearing on the adequacy of the juniors' replacement supplies pursuant to the procedure outlined in the CMR to provide timely replacement water in the amounts specified in the Director's May 2, 2005 Amended Order.

Respectfully submitted this 8<sup>th</sup> day of October, 2009.

- CITY OF POCA TELLO ATTORNEY'S OFFICE

By   
A. Dean Tranmer

WHITE & JANKOWSKI

By   
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## CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of September, 2009, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Opening Brief in Support of Petition for Rehearing** for Case No. CV-2008-0000551 upon the following by the method indicated:

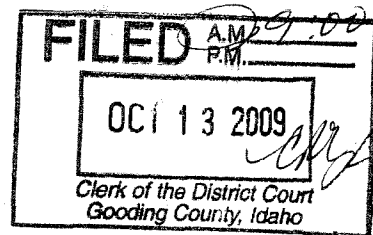


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

Case No.: CV-2008-551

## GROUND WATER USERS' OPENING BRIEF ON REHEARING

VS.

Respondents,

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY AND TWIN FALLS  
CANAL COMPANY

## INTRODUCTION

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the “Ground Water Users”), through counsel, submit this rehearing brief pursuant to Rule 42 of the Idaho Appellate Rules, in support of the issues that were granted rehearing in the *Ground Water Users’ Petition for Rehearing* filed August 13, 2009. The Ground Water Users petitioned for rehearing in response to the Court’s *Order on Petition for Judicial Review* dated July 24, 2009 (the “*Order*”), asking the court to reconsider and clarify portions of its decision. This opening rehearing brief addresses the following issues:

1. Whether the Court should clarify that the Director must decide the issue on the methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?
2. Whether the Court should clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended) amount?
3. Whether due process allows for junior groundwater users to be physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

## ARGUMENT

- 1. The Court Should Clarify That The Director Must Decide the Issue on Methodology for Determining Material Injury And Reasonable Carryover Based Exclusively Upon Facts And Evidence Contained In The Current Record Without Holding Any Additional Hearings On This Issue.**

The Ground Water Users request that the Court clarify its decision concerning the Director’s issuance of two “Final Orders” and determination of methodologies for determining material injury and reasonable carryover. The Court explained its decision as follows:

In the *Recommended Order*, the Hearing Officer found that adjustments should be made to the methodologies for determining material injury and reasonable carryover for future years. The Director adopted this conclusion, but did not address a new method in his September 5, 2008 *Final Order*. The process for determining material injury and reasonable carryover is an integral part of the Hearing Officer's *Recommended Order*, and the issues raised in the delivery call. The Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. In addition, the issuance of the separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be completed and timely.

*Order on Petition for Judicial Review* at 32 (citations omitted). Although the Court remanded this matter "for further proceedings consistent with this decision" (*Order on Petition for Judicial Review* at 33), there is no clarification or instruction as to what proceedings, if any, are required by the Director to remedy this deficiency. The Ground Water Users are concerned that, without such clarification or instruction, the Director may implement an improper proceeding or procedure resulting in the waste of additional judicial and legal resources. Action by the Court to provide the requested clarification and instruction will avoid the waste of those resources.

This concern stems from footnote 8 from the Court's *Order on Petition for Judicial Review*, in which the Court noted that "the Director issued an *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*" (hereinafter "*Order Regarding Protocol*") but that the *Order* was "not part of the record in this matter." The Ground Water Users are concerned that the Director may on remand simply incorporate the *Order Regarding Protocol* into a unified *Final Order*. The problem is that the *Order Regarding Protocol* contains methodology adjustments which are not based upon technical and scientific facts proffered at the three-week hearing from which this hearing arises. In other words, it is not based upon facts in the record before this Court. Rather, it appears that



the methodology adjustments contained in the *Order Regarding Protocol* are improperly based upon technical and scientific facts that were never proffered at the hearing either as evidence or by official notice.

To be clear, the Ground Water Users acknowledge that the Court is not in a position to determine whether the *Order Regarding Protocol* is or is not violative of Idaho law because it is not part of the record on appeal and the Ground Water Users are not seeking such a determination at this time. Rather, the Ground Water Users are simply requesting that the Court clarify that, with regard to the Court's order concerning the aforementioned methodology adjustments, the Director must rely exclusively upon the evidence and facts contained in the record established in the three-week hearing from which this appeal arises.<sup>1</sup>

This requested clarification is fully supported by the Idaho Administrative Procedures Act and IDWR's own procedural rules. The Idaho Administrative Procedures Act provides very specific rules with regard to Final Orders issued by State agencies. For example, Idaho Code § 67-5248(1) governing the contents of agency orders mandates that all orders contain a reasoned statement in support of the decision, findings of fact, a concise statement of "the underlying facts of record" supporting the findings, and the procedure and time limits for seeking reconsideration and other relief. Of even more significance to the matter at hand is the directive in Idaho Code § 67-5248(2) which requires that all findings of fact "must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." (Emphasis added).

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<sup>1</sup> IGWA agrees with the City of Pocatello in its *Opening Brief In Support Of Rehearing* that if any additional hearing is required, it is limited to any mitigation plan offered by the junior Ground Water Users.

The IDWR Rules of Procedure contain an identical requirement. Section 712 provides that all orders issued by IDWR must contain (among other things) findings of fact “based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” IDAPA 37.01.01.712 (emphasis added). Section 602 provides that a matter concerning “technical or scientific facts within the agency’s specialized knowledge” can be “officially noticed” only if (1) all parties to the contested hearing are “notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data” and (2) this required notice is “provided either before or during the hearing” and “before the issuance of any order” based upon the officially noticed material. IDAPA 37.01.01.602.

This Court has concluded that the Director must make adjustments to the methodologies for determining material injury and reasonable carry over and that those adjustments must be contained in a single Final Order.<sup>2</sup> Without question, these adjustments will be based upon technical and scientific facts. Pursuant to Idaho Code § 67-5248(1) and IDAPA 37.01.01.602 and IDAPA 37.01.01.712, the Director’s adjustments to the methodologies is exclusively limited to the technical and scientific facts “in the record of the contested case” or “officially noticed in that hearing.” Thus, as argued above, the Director’s adjustments to the methodologies are exclusively limited to the technical and scientific facts proffered in the three-week hearing from which this appeal arises.

The Court should also advise the Director that no further or additional hearing is permitted. There has already been a three-week hearing in which the method of calculating

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<sup>2</sup> The most judicious remedy would be to require IDWR to use its methodology, apply the facts and evidence already in the record and issue a unified order for purposes of one unified appeal in this case so that all issues could be briefed to the Supreme Court.

material injury and reasonable carryover was litigated at length. And there is no basis under either the Idaho Administrative Procedures Act or the IDWR Rules of Procedure for a rehearing. Considerable expense and effort have been incurred by all parties involved. All of these expenses and efforts will have been utterly wasted if a rehearing is required. This matter has been fully litigated and briefed before the Department. The Director should be instructed to issue its final order with regard to the methodology adjustments based exclusively upon the evidence and facts contained in the current record and without requiring any further hearings on the matter.

**2. In Times Of Shortage, The Director Has The Discretion Based Upon The Evidence Presented To Determine That Twin Falls Canal Company Is Not Entitled To Its Full Decreed (or Recommended) Amount.**

“[T]he quantity element in a water right necessarily sets the ‘peak’ limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted).” In Re: SRBA, *Memorandum Decision and Order on Challenge, Order Granting State of Idaho’s Motion for the Court to Take Judicial Notice of Adjudicative Facts, Order of Recommitment with Instructions to Special Master Cushman*, Subcase Nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L, and 36-00003M, at 41-42 (11/23/1999) citing, *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568 (1997). The Court on page 26 of the *Order on Petition for Judicial Review* (hereinafter “*Order*”) correctly applies this principle and found that “[i]n times of shortage junior users will only be regulated or required to provide mitigation subject to the material injury factors set forth in CM Rule 42” and that a “finding of material injury requires more than shortfalls to the decreed and licensed quantity of the senior

right.” These conclusions correctly find that the decreed quantity is an authorized maximum and that an application of the factors in CM Rule 42 may show that there is an amount of water that is less than the decreed or licensed quantity that a senior may be required to use in times of shortage.

However, on pages 31 and 32 of the *Order*, the Court determines that the Director exceeded his authority in determining that the full head gate delivery for Twin Falls Canal Company is  $\frac{5}{8}$  of an inch instead of  $\frac{3}{4}$  of an inch. The Court reasoned that because the Director recommended a maximum of  $\frac{3}{4}$  inch in his Director’s Report in the SRBA, that the Director cannot examine Twin Falls Canal Company’s need for water in times of shortage in a delivery call. However, this confuses the functions that are performed by the SRBA Court in decreeing the maximum beneficial use under a water right, and the Director’s function of distributing water under the CM Rules based on need and extent of beneficial use at that time, which is often something less than the maximum. The Supreme Court in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862 (2007) (“AFRD2”) recognized that the function performed in the SRBA is not the same as the function performed by the Director in water administration cases: “water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the Idaho Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), do not constitute a re-adjudication.” *Id.* at 877 (emphasis added). Yet, by requiring the Director to change his recommendation in the SRBA in order to distribute less than the peak amount in a delivery call case essentially relegates water administration to delivery of the amount on the decree, which again is the maximum amount. Evidence in the SRBA may end up showing that the Director’s recommendation of  $\frac{3}{4}$  inch is wrong, however, that has not been pre-determined in

the administrative hearing. If it had, the Director would be adjudicating the water right in violation of Idaho Code § 42-1401 et seq. In fact, if the Director changed his recommendation in the SRBA based solely on evidence in the administrative delivery call, as suggested in the *Order*, then it would be even more apparent that the Director was not distributing water under the CM Rules but re-adjudicating the water right. Thus, requiring the Director to change his recommendation in the SRBA would directly usurp the SRBA's adjudicatory function and authority. These points need to be clarified and the apparent inconsistency of the Court's statements on pages 26 and 31 resolved.

The Court should confirm that for purposes of this delivery call, evaluation of Twin Falls Canal Company's material injury can be based  $\frac{5}{8}$  inch as established by the evidence in the case and that the Director did not abuse his discretion in making that determination.

**3. Due Process Demands That Junior Ground Water Users Not Be Physically Curtailed Until After A Hearing On The Extent Of Material Injury And Mitigation Plan.**

The Idaho Supreme Court affirmed in *Nettleton v. Higginson*, 98 Idaho 87 (1977) that due process justifies a hearing *before* curtailment when it comes to ground water administration. "[I]ndividual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state," and "except in 'extraordinary circumstances' where some valid governmental interest justifies the postponement of notice and a hearing, due process requires an adversary proceeding before a person can be deprived of his property interest." *Nettleton*, 98 Idaho at 90 (citing Idaho Const. Art. 15, § 4; quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972)). There are three clearly-defined requirements to establish the "extraordinary circumstances" necessary to justify postponement of a hearing:

First...the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for

very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standard of a narrowly drawn statute, that it was necessary and justified in the particular instance.

*Nettleton*, 98 Idaho at 92 (quoting *Fuentes*, 407 U.S. at 92). Issues unique to conjunctive management bear directly on two of the requirements that must be met to curtail without a prior hearing. First, the curtailment must be “necessary to secure an important governmental or general public interest.” *Fuentes*, 407 U.S. at 92. In *Nettleton* the Court cited the governmental and general public interest “of securing the maximum use and benefit of its water resources.” 98 Idaho at 90. As between surface water users, that is accomplished by application of doctrine that “first in time is first in right.” In contrast, while “first in time is first in right” has a place in the conjunctive management context, the Legislature has mandated that the doctrine “shall not block full economic development of underground water resources.” Idaho Code § 42-226.

The law of full economic development gives rise to public interest and economic considerations that are not susceptible to quick, easy and straightforward determination. Further, the conjunctive administration of surface and groundwater rights is far more technically complex than the relatively simple administration of surface water rights. Whereas essentially all of a curtailed surface water right reaches the calling senior, the curtailment of a groundwater right has a radial effect, resulting in the calling senior receiving only a fraction of the curtailed junior water use. And, in this case, the vast majority will never be used by the Surface Water Coalition. *See Ground Water Users’ Brief in Response to Surface Water Coalition’s Joint Opening Brief* filed on April 30, 2009 at 8; Wylie, Tr. Vol. 3, p. 593, L. 10-19. Consequently, the Idaho Supreme Court expressly recognized that conjunctive administration cannot be reduced to a simple ministerial act, but instead

‘requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water rights are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.’ *AFRD2*, 143 Idaho at 877 (quoting *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422 (1997)). “That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.” *Id.*

Secondly, due process can be satisfied without a hearing prior to curtailment only when “there has been a special need for very prompt action.” *Fuentes*, 407 U.S. at 92. In surface water administration, the effects of curtailment are relatively easy to predict, usually well-established, and essentially immediate, which enables IDWR to provide an immediate response to delivery calls, and allows seniors to receive an immediate benefit from curtailment. In contrast, the effects of groundwater curtailment are very difficult to predict and typically take years and even decades to be realized. Immediate curtailment does not provide an immediate benefit to the calling senior. Moreover, groundwater curtailment is a long-term, often permanent arrangement, whereas surface water curtailment is seasonal, with each surface right beginning anew the following spring.

Consequently, “the state policy of securing the maximum use and benefit of its water resources,” *Nettleton*, 98 Idaho at 90, is accomplished differently in conjunctive administration than in surface water administration. Surface water administration is governed by priority with few limitations. Conjunctive management, on the other hand, is governed by the CM Rules which account for the hydrologic complexities of groundwater administration as well as the law of full economic development. Given such differences, the Idaho Supreme Court rejected the argument made in the *AFRD2* case that the Director should curtail before holding an administrative hearing on the extent of material injury and proposed mitigation in the

conjunctive management context. The Idaho Supreme Court explained that what is “timely” simply means something different in conjunctive administration than it does in surface water management:

While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior’s right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

*AFRD2*, 143 Idaho at 875.

The District Court in its *Order on Petition for Judicial Review in Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 (Fifth Jud. Dist. Gooding County) at 49 stated that “[a]fter an initial order is issued and pursuant to the requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed.” Junior priority groundwater users cannot be expected to divine when and where delivery calls may come from or to have a mitigation plan in place for every conceivable delivery call. This factual reality supports the Court’s conclusion that “a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury ... and the mitigation plan at the same time.” *Id.* at 51.

However, a more appropriate process would be to provide a hearing prior to the finding of injury so that the Director had input from the water users, both junior and senior, before making his initial determination. The Director’s commitment to immediate curtailment resulted



in hasty evaluation of complex technical and legal issues of first impression without the benefit of a full evidentiary record or alternative perspectives. Admittedly, holding a hearing before curtailment may result in some delay in curtailment (if curtailment turns out to be justified), leaving the senior users without their full water supply (but still receiving nearly their full supply) for a time. But in “balancing ... both the nature of the government function and the private interests affected” (*Nettleton*, 98 Idaho at 90), that risk is far outweighed by the risk of massive and potentially irreversible harm that results from the type of widespread curtailment that occurs in conjunctive management.<sup>3</sup> In this case, the amount of curtailment contemplated would have been over 80,000 acres in 2005. R. Vol. 8 at 1359.

The Idaho Supreme Court certainly realized that holding a hearing before curtailment may result in delayed implementation if curtailment turns out to be justified, but still accepted that a hearing before curtailment is a more appropriate course, explaining that “concepts like beneficial use, waste, reasonable means of diversion and full economic development ... are highly fact driven and sometimes have unintended or unfortunate consequences” (as opposed to stating that “first in time is first in right” has unintended and unfortunate consequences). *AFRD2*, 143 Idaho at 869.

With these principles in mind, the Court should clarify its *Order* in this case to state when curtailment can legally occur consistent with the parties’ rights to due process. The Court’s finding on p. 29 of the *Order* states that:

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<sup>3</sup> If a hearing is held before curtailment is ordered, the senior user still receives almost their entire water supply and in fact diverts as much water as they want during the irrigation season because storage water is available and has never ran out. See *Final Order Regarding the Surface Water Coalition Delivery Call* dated September 5, 2008, FF 13, R. Vol. 39 at 7384; Swank Tr. Vol. 5, p. 992, L. 12-18. In contrast, if curtailment is ordered before a hearing, the Ground Water Users’ water rights are deprived entirely, resulting in no beneficial use and potentially irreversible harm.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer . . .

However, in the *Order on Petition for Judicial Review in Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 (Fifth Jud. Dist. Gooding County) the Court found in that

After the initial order is issued and pursuant to the constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed and before the senior rights are injured further.

Id. at 49. The Court further stated that

[A] more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury . . . and the mitigation plan at the same time.

The indication in that case is that the curtailment order should not be enforced until a hearing process has been completed on a mitigation plan and a final order issued. The Court should confirm in its *Order* that the same process applies here.

### CONCLUSION

Based on the foregoing the Ground Water Users request that the Court 1) instruct the Director to issue a final order with regard to the methodology adjustments based exclusively upon the evidence and facts contained in the current record and without requiring any further hearing; 2) clarify that the determination of material injury for Twin Falls Canal Company can be based on something less than their maximum decreed (or recommended) quantity; and 3) clarify the requirements for due process in delivery call proceedings.

DATED this 9<sup>th</sup> day of October, 2009.



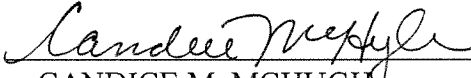
RANDALL C. BUDGE  
CANDICE M. MCHUGH

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9<sup>th</sup> day of October, 2009, the above and foregoing document was served in the following manner.

Deputy Clerk Gooding County District Court P.O. Box 27 Gooding, Idaho 83333	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile 208-934-5085 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail
Judge Melanson (courtesy copy) SRBA District Court 253 3 <sup>rd</sup> Avenue N. P.O. Box 2707 Twin Falls, Idaho 83303-2707	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile 208-736-2121 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail
Tom Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 2598 Boise, Idaho 83701-2598	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile 208-424-8873 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail <a href="mailto:tarkoosh@capitollawgroup.net">tarkoosh@capitollawgroup.net</a>
Phillip J. Rassier Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile 208-287-6700 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail <a href="mailto:phil.rassier@idwr.idaho.gov">phil.rassier@idwr.idaho.gov</a> <a href="mailto:chris.bromley@idwr.idaho.gov">chris.bromley@idwr.idaho.gov</a>
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, Idaho 83318-0248	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile 208-878-2548 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>
John Simpson Travis L. Thompson Barker Rosholt P.O. Box 2139 Boise, Idaho 83701-2139	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile 208-344-6034 <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlr@idahowaters.com">tlr@idahowaters.com</a>

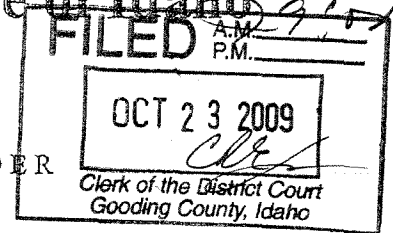
<p>Sarah Klahn  WHITE JANKOWSKI, LLP  511 16<sup>th</sup> St., Suite 500  Denver, Colorado 80202</p>	<p><input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> E-mail  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a></p>
<p>Dean Tranmer  CITY OF POCA TELLO  P.O. Box 4169  Pocatello, Idaho 83205</p>	<p><input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> E-mail  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>

  
CANDICE M. MCHUGH

# In the Supreme Court of the State of Idaho

ASSIGNMENT OF JUDGE JOHN M. MELANSON,  
IDAHO COURT OF APPEALS, TO THE  
FIFTH JUDICIAL DISTRICT, STATE OF IDAHO

ORDER



A request having been received for judicial assistance in the Fifth Judicial District, State of Idaho; therefore good cause appearing,

IT HEREBY IS ORDERED that the Honorable JOHN M. MELANSON, Judge of the Idaho Court of Appeals, be, and he hereby is, ASSIGNED the cases set forth below for purposes of any pending matters and all proceedings necessary for final disposition:

**Clear Springs Food, Inc., etal. v. Idaho Department of Water Resources, etal.**  
Gooding County Case No. CV-2008-444

**A & B Irrigation District, etal. v. David Tuthill, etal.**  
Gooding County Case No. CV-2008-551

**Clear Springs Food, Inc. v. David Tuthill, etal.**  
Gooding County Case No. CV-2009-241

**Idaho Ground Water Appropriators v. Idaho Department of Water Resources**  
Gooding County Case No. CV-2009-270  
(CASES CONSOLIDATED)

**Snake River Basin Adjudication v. Est, Curtis, Howery, Delis, Pappas, Ann, etal.**  
Twin Falls County Case No. CV-1987-39576

IT FURTHER IS ORDERED that if a court reporter is not available, Judge JOHN M. MELANSON may Order that the proceedings to which he is assigned be recorded by an electronic device in lieu of stenographic means, which recording shall constitute the official record of the case.

IT FURTHER ORDERED that a copy of this Order shall be placed in a judge assignments file to be maintained by the District Court Clerk as a central register of all judge assignment orders.

DATED this 20 day of October 2009.

By Order of the Supreme Court

A handwritten signature in dark ink, appearing to read "Daniel T. Eismann".

Daniel T. Eismann, Chief Justice

ATTEST:

A handwritten signature in dark ink, appearing to read "Stephen W. Kenyon".  
Stephen W. Kenyon, Clerk

cc: Judge John M. Melanson, Idaho Court of Appeals  
Administrative District Judge R. Barry Wood  
Trial Court Administrator Linda Wright  
Administrative Director of the Courts Patricia Tobias  
Deputy Administrative Director of the Courts Corrie Keller

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DISTRICT COURT  
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Company*

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**

**OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

**A&B IRRIGATION DISTRICT,  
AMERICAN FALLS RESERVOIR  
DISTRICT #2, BURLEY IRRIGATION  
DISTRICT, MILNER IRRIGATION  
DISTRICT, MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL  
COMPANY and TWIN FALLS CANAL  
COMPANY.**

Petitioners,

VS.

**GARY SPACKMAN**, in his capacity as Interim  
Director of the Idaho Department of Water

)  
 ) CASE NO. CV 2008-551  
 )  
 )  
 )  
 ) **SURFACE WATER COALITION'S**  
 ) **RESPONSE TO IGWA'S AND CITY**  
 ) **OF POCATELLO'S PETITIONS**  
 ) **FOR REHEARING**

SWC RESPONSE TO PETITIONS FOR REHEARING

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Resources, and THE IDAHO DEPARTMENT )  
OF WATER RESOURCES, )

Respondents. )

IN THE MATTER OF DISTRIBUTION OF )  
WATER TO VARIOUS WATER RIGHTS )  
HELD BY OR FOR THE BENEFIT OF A&B )  
IRRIGATION DISTRICT, AMERICAN )  
FALLS RESERVOIR DISTRICT #2, )  
BURLEY IRRIGATION DISTRICT, )  
MILNER IRRIGATION DISTRICT, )  
MINIDOKA IRRIGATION DISTRICT, )  
NORTH SIDE CANAL COMPANY, AND )  
TWIN FALLS CANAL COMPANY )

COME NOW, Petitioners, A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD #2"), Burley Irrigation District ("BID"), Milner Irrigation District ("Milner"), Minidoka Irrigation District ("MID"), North Side Canal Company ("NSCC"), and Twin Falls Canal Company ("TFCC") (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through their undersigned counsel, and hereby file this response to the petitions for rehearing filed by IGWA and the City of Pocatello ("Pocatello") on October 9, 2009.

As explained in detail below, the relief sought by IGWA and Pocatello is not warranted and therefore their petitions should be denied. The Court should affirm its July 24, 2009 *Order on Petition for Judicial Review* ("Order").

## ARGUMENT

### I. IGWA's Request to Restrict Future Procedures on Remand is Not Warranted.

The Court correctly found that the "Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*." *Order* at 32. The Court determined that the Director's "two order" approach violated Idaho's APA and IDWR's own

SWC RESPONSE TO PETITIONS FOR REHEARING

procedural rules. *See id.* There is nothing ambiguous or erroneous in the Court's decision on this issue. Hence, there is no basis to reconsider or clarify the ruling.

Under the guise of seeking clarification of the Court's decision, IGWA asks this Court for new anticipatory relief against IDWR on the theory that the "Director may implement an improper proceeding or procedure resulting in the waste of additional judicial and legal resources". *IGWA Br.* at 3. IGWA's claim is not supported by Idaho's APA or any other law and should be denied.<sup>1</sup>

The Court remanded the case to IDWR for "further proceedings consistent with this decision". *Order* at 33. This ruling was consistent with Idaho law which provides that "[i]f the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary". I.C. § 67-5279(2). IGWA asks this Court to pre-judge the Director's decision on remand, as it is apparently concerned the Director will not remedy the errors with the final order as directed by the Court. Although SWC agrees with IGWA that the Director cannot simply re-issue a new final order based upon evidence not included in the existing agency record, there is no reason to assume IDWR or the Director will issue such an erroneous decision. Although IGWA references the former Director's June 30, 2009 *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* as its basis to argue that IDWR "may" incorporate that decision into a "unified Final Order" in this proceeding, that "assumption" is no basis to grant the new relief IGWA seeks on re-hearing.<sup>2</sup>

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<sup>1</sup> Both IGWA and Pocatello seek "new" relief in this case through their petitions for rehearing by asking the Court to prohibit or restrict future agency action. This type of request is improper for petition for rehearing: "Generally, a litigant may not raise new legal points, questions, issues, contentions or arguments... for the first time on a petition or motion for rehearing." 5 CJS § 803. That instead "a petition for rehearing is generally confined to those issues which were properly presented in the initial appeal, but were overlooked or improperly decided." *Id.* In light of long established case law and policy, the Court should dismiss new issues raised by IGWA and Pocatello.

<sup>2</sup> The Court correctly noted that the June 30, 2009 order is not part of the record in this matter. *See Order* at 32, n. 8.



Stated another way, IGWA's requested relief hinges completely upon the assumption that the Director may violate the law in the future by incorporating information not in the record into his new final order. This is not a proper basis for rehearing or clarification of the Court's *Order* in this case.

Importantly, the Court ruled that the Director abused his discretion and violated Idaho law in attempting to issue "two orders issued months apart". *Order* at 32. Accordingly, the Director has no authority to simply adopt the *2009 Protocol Order* as a "final order" in this matter as IGWA fears. Moreover, the former Director issued that "interlocutory order" the day before he retired from IDWR, and a month prior to this Court's decision. In issuing the *2009 Protocol Order*, the former Director wrongly assumed the decision he issued on September 5, 2008 (R. Vol. 39 at 7981) and the process he was employing with a "two order" approach in this matter was correct.

Accordingly, since the *2009 Protocol Order* was issued improperly and does not reflect the requirements of IDWR as set forth in this Court's order on judicial review, there is no basis to assume that IDWR can or will adopt that decision on remand. Moreover, the Director recently rescinded the *2009 Protocol* by order issued on November 5, 2009. Contrary to IGWA's request, the Court should instead presume that IDWR will follow the law in issuing a new final order consistent with this Court's July 24, 2009 *Order*.

Second, IGWA requests clarification that the Director rely "exclusively upon the evidence and facts contained in the record" in this case when issuing a new final order consistent with this Court's order. *IGWA Br.* at 4. Although SWC agrees that the Director is required to issue a new order on remand based upon the facts and evidence included in the existing agency record, IGWA asks this Court to further "advise the Director that no further or additional hearing

is permitted". *IGWA Br.* at 5. Similar to its first request wherein IGWA assumes that the Director is destined to err in issuing a new final order, IGWA's request to prohibit additional proceedings before IDWR is premature and improper at this stage in the litigation.

While the SWC agrees that the Director has an adequate record in this case to issue a new final order consistent with this Court's directives, the requested relief to "prohibit further hearings on this matter" is not appropriate at this time and is unnecessary for purposes of reconsideration or clarification of the Court's *Order*. The Court should presume that IDWR and the Director will follow the law and the Court's July 24, 2009 *Order* in issuing a new final agency order in this case. IGWA's request wrongly presumes that the Director would require "rehearing" of the entire case in order to implement the Court's order. *IGWA Br.* at 6.

Rather than prohibit or pre-judge IDWR's future action on remand now, the better approach, consistent with the requirements of judicial review under Idaho's APA, is to presume the Director will issue a new final order consistent with this Court's order. If the Director issues a new decision that is not based upon "sufficient evidence" it may be that an additional hearing will be necessary at that time. *See Hardy v. Higginson*, 123 Idaho 485, 492 (1993) (Court may remand matter to IDWR for further proceedings if the record is insufficient to support its decision). Alternatively, if and when the Director proposes additional proceedings or a hearing as part of that process, the parties can address the necessity of that action or its scope at that time.

Accordingly, the SWC submits that the Court should not completely "prohibit" any future hearing at this time as IGWA's request presumes unlawful action on part of IDWR or the Director that has yet to occur.

**II. IGWA's Request that the Court Clarify the Director's Authority to Determine that TFCC May Not be Entitled to its Full Decree in Times of Shortage Should be Denied.**

IGWA confuses two distinct issues here and requests clarification regarding a perceived discrepancy between two of the Court's holdings, when in fact both holdings can be read in light of the other without contradiction. IGWA seeks clarification of the full headgate delivery to TFCC and the fact that in times of shortage, a senior water right holder may receive less than the full decreed water right without sustaining material injury under the CM Rules. The only inconsistency here, as pointed out by the Court in the Order, is the Director's recommendation of 3/4 inches per acre delivery to TFCC in the SRBA adjudication and the Director's adoption of the Hearing Officer's findings in favor of 5/8 inch per acre in the present proceeding.

The Court is correct in holding that the Director exceeded his authority in determining that full headgate delivery for TFCC should be calculated at 5/8 of an inch instead of its decreed right of 3/4 of an inch per acre. The Director's finding was not supported by the substantial evidence in the record - which includes prior decrees and the testimony of TFCC shareholders that demonstrate less than 3/4 inch per share represents an injury to the water right and further impacts crop yields and farming operations. R. Vol. 37 at 7102; R. Vol. 39 at 7382. The Court was therefore right to reverse the Director on this point.

A prior decree is binding as to the "nature and extent" of the water right. *See* Idaho Code § 42-1420. As such, the Department is bound to accept a prior decree for purposes of administration. In addition, the administrative process cannot be used to re-adjudicate the prior decree. *AFRD#2*, at 878; R. Vol. 37 at 7072. Rather, in water right administration, the Director's discretion is limited to reviewing the decrees and considering those "post adjudication factors" that impact the proposed water use.

The Director and watermaster are required to distribute water to TFCC's water rights, not according to a "per share" or "per acre" calculation that differs from what can be beneficially used within the authorized diversion rates of TFCC's decreed water rights. The law demands as much. *See* Idaho Code §§ 42-602 & 42-607. Reduced deliveries have injured TFCC's water rights and resulted in impacts to its shareholders' crop yields and farming operations. R. Vol. 33 at 6363-64; 6270-72; 6338-39; R. Vol. 40 at 7546-50.

TFCC's natural flow water rights have been recommended in the SRBA in a manner consistent with TFCC's historical delivery of 3/4 inch at the headgate. *See* Ex.4001A. Objections have been filed to these recommendations, *see* Ex. 9729, and the subcases are proceeding through the SRBA. The Court's order on this issue is fully supported by the law and facts in this case. For the above stated reasons, the Court should deny IGWA's request for clarification on this point.

**III. Idaho's Water Distribution Statutes and CMRs Do Not Require a Hearing Prior to Administration of Junior Priority Ground Water Rights.**

This issue is squarely before the Court in a separate appeal concerning the Director's final order in the Spring Users case. *See Clear Springs et al. v. Spackman et al.* (Idaho 5<sup>th</sup> Jud. Dist., Case No. 2008-444). SWC incorporates by reference the arguments presented in that case and provides a brief summary of those arguments below for the Court's convenience.

Within organized water districts the watermasters have a clear legal duty to distribute water as follows:

**... the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply,**

**when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply...**

Idaho Code § 42-607 (emphasis added).

CM Rule 40 similarly requires the Director to either order curtailment of the junior water rights or allow out-of-priority diversions pursuant to an approved mitigation plan. *See Clear Springs Brief in Support of Joint Petition for Rehearing* at 14 (Idaho 5<sup>th</sup> Jud. Dist, Case No. 2008-444). Unlike CM Rules 30 and 41, which expressly provide for contested case procedures and a hearing prior to administration, Rule 40 follows the statutory system of administration followed in organized water districts.

Further, Rule 40 makes it clear that junior “surface” water rights are subject to immediate curtailment to protect senior rights. *See* CMR 40.02.a. The same is required of junior “ground” water rights. *See* CMR 40.02.b. If the Director issues a curtailment order and no mitigation plan has been approved, injuring junior ground water rights are subject to immediate “regulation” or curtailment in order to protect senior surface water rights within the water district. Just as there is no basis to provide a hearing before curtailing a junior “surface” water right holder within an organized water district, the same applies for junior “ground” water rights found to be injuring senior surface water rights.

SWC has a right to the expectation that its rights will be protected from interfering junior rights within organized water districts. *See Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972) (Senior water users are “entitled to presume that the watermaster is delivering water to them in compliance with the governing decree.”). Senior water right holders should not be submitted to “mini-adjudications” or countless “contested cases” every time they request administration within the water district. Junior ground water users have the option to file a CM

Rule 43 mitigation plan and obtain approval to prevent injury to the senior if they want to divert out-of-priority.

That the law requires no hearing before implementing the administrative action follows the constitution's law of prior appropriation. IDAHO CONST. Art XV, § 3. The Idaho Supreme Court addressed the subject in *Nettleton v. Higginson*, 98 Idaho 87 (1977), where the Court rejected the "due process" challenge:

The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. As to the private interests affected, **it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation, i.e. first in time is first in right.**

\* \* \*

**The requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code.** Our holding is supported by a comparison of the state's duty as mandated by Article 15, § 1 of the Idaho Constitution with the appellant's ability, under I.C. § 42-1405, to at any time verify his "constitutional use right," thereby reaping the protective benefit of I.C. § 42-607 himself. **Granted that when action is taken pursuant to I.C. § 42-607 there is no notice or hearing prior to the shutting off of the unadjudicated water rights,** but as the United States Supreme Court noted in *Fuentes v. Shevin*, supra, there are extraordinary situations when postponement of notice and a hearing is justified.

98 Idaho at 90-92 (emphasis added).

Just as there is no "notice and hearing" prior to "shutting off" unadjudicated water rights in a water district, the same procedure applies to junior priority adjudicated and licensed water rights when necessary to fill senior rights in times of shortage. See I.C. § 42-607; *Nettleton*, 98 Idaho at 93 ("In times of shortage one holding an unadjudicated water right stands in the position similar to he who holds the 'recorded' water right of the lowest priority date."). This is consistent with the Supreme Court's holding and reasoning set forth in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007), wherein the Court stated:

We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that **the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right**. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.

143 Idaho at 874 (emphasis added).

Pursuant to the Supreme Court's holding in *Nettleton*, there is no violation of "due process" when the watermaster performs his duty and curtails junior rights without a hearing. This ensures "timely delivery" of water to the senior. Any delay in administration, caused by the holding of an administrative hearing or otherwise, would impermissibly shift the burden to the senior and perpetuate the injury caused by interfering juniors.

As found in *Nettleton*, administration of junior rights, surface or ground water, does not require a hearing before curtailment. The Court should therefore deny IGWA's request for clarification that Idaho's water distribution statutes and the CM Rules do not require a hearing prior to the administration of junior water rights. The law in Idaho has long been clear that no hearing is required, no further clarification is needed.

#### **IV. Pocatello's Petition Is an Untimely Appeal of the Director's Final Order.**

Pocatello requests the Court to "explain that the remaining process to be afforded to participants is a hearing *solely* on the issue of the reliability of the juniors' proffered replacement water pursuant to CMR 43." *Poc. Br.* at 3. Similar to IGWA's petition for rehearing, Pocatello asks this Court to restrict IDWR's future actions in this case. Pocatello confuses issues of "due process" in this proceeding with that related to future hearings on mitigation plans yet to be filed by junior ground water users that injure the SWC's senior surface water rights. The Director has yet to issue his final injury decision consistent with Idaho law and this Court's July 24, 2009 *Order*. Moreover, no Rule 43 mitigation plans have been filed by IGWA or others to prevent

injury to the SWC. Contrary to Pocatello's theory, the Court is not in a position to prohibit or restrict future hearings before IDWR on these matters.

In support of its claim to restrict future proceedings, Pocatello erroneously argues that the "Director properly made a preliminary determination of injury to the calling water right". *Id.* at 6. Pocatello asks this Court to revise its holding in its July 24, 2009 *Order* to, among other things, instruct IDWR that it "may hold a hearing on the adequacy of the juniors' replacement supplies . . . to provide timely replacement water in the amounts specified in the Director's May 2, 2005 Amended Order." *Id.* at 9. This request completely misrepresents the record in these proceedings and must be denied since it constitutes an untimely appeal of the Director's September 5, 2008 Final Order.

As explained above, the Director has not yet issued his final injury decision consistent with Idaho law and this Court's July 24, 2009 *Order*. Contrary to Pocatello's theory, the amount of injury "specified in the Director's May 2, 2005 Amended Order" was not adopted in the Director's September 5, 2008 Final Order. A brief review of the orders in this case plainly reveals that the methodology and the Director's original injury determinations made in 2005 were in error.

Justice Schroeder summarized the legal and factual errors with the Director's injury determination in the May 2, 2005 Amended Order as follows:

**8. The attempt to project the amount of water that is necessary for the members of the SWC to fully meet crop needs within the licensed or decreed amounts is an acceptable approach to conjunctive management, but there have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained.** Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at a base and works up according to need, the end result should be the same. However, there should be adjustments if the process of establishing a base different from the licensed amount is to be utilized in future administration. . . .



a. 1995 was a wetter than average year, diminishing the validity of use of that year to establish the base for a minimum full supply and underestimating the material injury likely to occur in 2005 and subsequent years. According to the Snake River Heise Natural Flow information from 1911-2004 (exhibit 100) 1995 was in the top third of wet years. Overall it was a wetter than average year. This warps the determination of a base supply downward. If precipitation saturates the soil and relieves the need for the use of irrigation either from natural flow or storage the amount necessary from natural flow and storage declines. Basing the minimum full supply on a wet year makes it likely that material injury was underestimated in 2005 and subsequent years, unless an adjustment is made at the outset to account for the effects of a greater than average amount of precipitation through the year.

\* \* \*

6. The minimum full supply established in the May 2, 2005, Order is inadequate to predict the water needs of SWC on an annual basis. There are too many unaccounted variables in the minimum full supply analysis to be continued in use as the baseline for predicting the likelihood of material injury.

7. In the absence of acceptable average budget analysis amounts from either party, the Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury. . . . The approach adopted in the May 2, 2005 Order was a response to a call for curtailment which required a response. It was never intended to be the final word. Within this context it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff.

R. Vol. 37 at 7091-92, 7097-98.

Justice Schroder expressly found that the Director “underestimated” the SWC’s injury in the May 2, 2005 Amended Order. *Id.* at 7092. He further held that the “minimum full supply” was “inadequate to predict the water needs of SWC on an annual basis”. R. Vol. 37 at 7097. The Director adopted these findings in his September 5, 2008 Final Order. R. Vol. 39 at 7382. In addition, this Court’s decision on the Director’s failure to account for multiple years of carry-over storage further demonstrates the errors in the May 2, 2005 Amended Order where the Director only accounted for one year of “reasonable carry-over storage”. Accordingly, there is

no question that the Director's "injury amounts" in the May 2, 2005 Amended Order have not been adopted by the agency in this case and should not be affirmed by this Court on the basis of Pocatello's rehearing petition.

If Pocatello truly believed the "injury" amounts from the Director's May 2, 2005 Amended Order should have been affirmed on judicial review, Pocatello had the opportunity to appeal the Director's final order in this case. Pocatello did not file a timely appeal as required by Idaho's civil rules. *See* I.R.C.P. 84(b) (petition for judicial review must be filed within 28 days of agency action). Consequently, Pocatello's efforts to have this Court reverse the Director's Final Order now through a petition for rehearing should be rejected. *See* I.R.C.P. 84(n); *see also*, *Horne v. Idaho State University*, 138 Idaho 700 (2003); *Canyon County Bd. of Equalization v. Amalgamated Sugar Co., LLC*, 143 Idaho 58, 62 (2006).

#### CONCLUSION

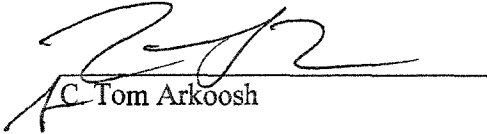
IGWA and Pocatello have failed to present sufficient legal or factual reasons to justify reconsideration or clarification of the Court's July 24, 2009 *Order* in this case. Although IGWA and Pocatello both seek to restrict or prohibit future proceedings on remand before IDWR, their arguments are based upon assumptions and a misinterpretation of the status of the agency orders in this case. Since the Director has been instructed to issue a new final order consistent with Idaho law and this Court's decision, that process is not yet complete. Finally, Pocatello's requested revision of the Court's decision constitutes an untimely appeal. Since the injury determination in the May 2, 2005 Amended Order was not accepted, nor appealed by any party, the Court cannot reverse that decision now on rehearing.

In summary, the petitions for rehearing are simply untimely requests for relief or judicial review against IDWR and should be denied.

DATED this 6<sup>th</sup> day of November, 2009.

CAPITOL LAW GROUP, PLLC

FLETCHER LAW OFFICE

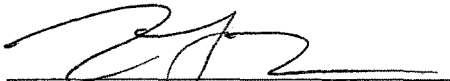
  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10<sup>th</sup> day of November, 2009, I served true and correct copies of the *Surface Water Coalition's Response to IGWA's and City of Pocatello's Petitions for Rehearing* upon the following by the method indicated:

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Attorneys for Respondents

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**  
**OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

A&B IRRIGATION DISTRICT, AMERICAN FALLS )  
RESERVOIR DISTRICT #2, BURLEY IRRIGATION )  
DISTRICT, MILNER IRRIGATION DISTRICT, )  
MINIDOKA IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY, and TWIN FALLS CANAL )  
COMPANY, )

Petitioners, )

vs. )

GARY SPACKMAN, in his capacity as Interim )  
Director of the Idaho Department of Water Resources, )  
and THE IDAHO DEPARTMENT OF WATER )  
RESOURCES, )

Respondents. )

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO VARIOUS WATER RIGHTS HELD BY OR FOR )  
THE BENEFIT OF A&B IRRIGATION DISTRICT, )  
AMERICAN FALLS RESERVOIR DISTRICT #2, )  
BURLEY IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )  
DISTRICT, NORTH SIDE CANAL COMPANY, )  
AND TWIN FALLS CANAL COMPANY )

DISTRICT COURT  
GOODING CO. IDAHO  
FILED

2009 NOV -9 AM 8:14

GOODING COUNTY CLERK

BY: *[Signature]*  
DEPUTY

Case No. CV-2008-0000551

**IDWR RESPONSE BRIEF  
ON REHEARING**

On October 8, 2009, the City of Pocatello and the Ground Water Users filed opening briefs on rehearing in the above-captioned matter. In this brief, the Idaho Department of Water Resources (“Department” or “Director”) will respond solely to the first issued identified by the Ground Water Users in their opening brief:

Whether the Court should clarify that the Director must decide the issue on methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?

*Ground Water Users’ Opening Brief on Rehearing at 2.*

In his September 5, 2008 Final Order, former Director Tuthill did not describe his methodology for determining material injury to reasonable carryover and reasonable in-season demand. Instead, the former Director stated that he would “issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing will be provided on the order.” R. Vol. 37 at 7386. This Court found that the Director’s decision to issue separate orders was improper. *Order on Petition for Judicial Review at 32.*

As noted by this Court, the separate order was issued on June 30, 2009, but is not part of the record in this proceeding. *Id.* It should also be noted that the June 30, 2009 order was issued as an interlocutory order in accordance with IDAPA 37.01.01.710. On November 5, 2009, the Director rescinded the June 30, 2009 interlocutory order. IDAPA 37.01.01.710.

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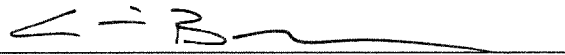
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Based on his review of the record, the Director agrees that sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand. The Director will work expediently to issue the order on material injury to reasonable carryover and reasonable in-season demand for review by this Court.

DATED this 6<sup>th</sup> day of November 2009.

LAWRENCE G. WASDEN  
Attorney General  
CLIVE J. STRONG  
Deputy Attorney General  
CHIEF, NATURAL RESOURCES DIVISION



CHRIS M. BROMLEY  
Deputy Attorney General  
Idaho Department of Water Resources

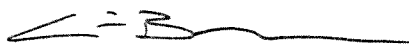
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 6<sup>th</sup> day of November 2009.

Document Served: **IDWR RESPONSE BRIEF ON REHEARING**

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

A&B IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, and TWIN FALLS  
CANAL COMPANY

Case No.: CV-2008-0000551

**GROUND WATER USERS'  
REPLY ON REHEARING**

UNITED STATES OF AMERICA,  
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as Interim  
Director of the Idaho Department of Water  
Resources, and THE IDAHO DEPARTMENT  
OF WATER RESOURCES

Respondents,

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN

FALLS RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY AND TWIN FALLS  
CANAL COMPANY

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the "Ground Water Users"), through counsel of record, submit this Reply Brief in response to the Responses respectively filed by the Surface Water Coalition ("SWC") and the Idaho Department of Water Resources ("IDWR") on November 6, 2009.

#### ARGUMENTS IN REPLY

- I. **There is sufficient facts and evidence in the current record for IDWR to issue an order establishing the methodology for determining material injury and reasonably carryover without holding any additional hearings on these matters.**

In their Opening Brief on Rehearing filed October 13, 2009, the Ground Water Users requested that the Court instruct IDWR to enter an order establishing the methodology for determining material injury and reasonable carryover based exclusively upon the facts and evidence contained within the current record and to do so without requiring any additional hearings in this case. It was the Ground Water Users' concern that IDWR was going to require a re-hearing with regard to these matters where new facts and evidence would be elicited. Having already established an extensive record based on substantial pre-filed written direct and rebuttal testimony and exhibits filed by all parties followed by a lengthy three-week evidentiary hearing on these matters, the Ground Water Users' believe it is improper to simply disregard the facts and evidence proffered at that hearing and that any further hearing would be duplicative, unnecessary and burdensome to the parties and the Department.

In their Response to Petitions for Rehearing filed on November 6, 2009, the SWC agreed that IDWR should issue its order without requiring another evidentiary hearing. The SWC acknowledged that "the Director is required to issue a new order on remand based upon the facts and evidence in the existing agency record" and that "the Director has an adequate record in this case to issue a new final order consistent with the Court's directive." *See SWC Response to Petitions for Rehearing*, at p. 4-5.

IDWR also agreed with this proposition. IDWR indicated in its Response Brief on Rehearing filed November 6, 2009 that "the Director agrees that sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand." This is an acknowledgement that another evidentiary hearing will not be necessary.

Based upon the acknowledgements of both the SWC and IDWR, it is requested that the Court instruct IDWR to enter an order establishing the methodology for determining material injury and reasonable carryover based exclusively upon the facts and evidence contained within the current record and to do so without requiring any additional evidentiary hearings in this case.

**II. The Director is authorized in times of shortage to determine that the Twin Falls Canal Company is not entitled to its full or recommended amount.**

As set forth in their Opening Brief on Rehearing, the Ground Water Users' assert that in times of water shortage a water user is "limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted)." *In re: SRBA, Memorandum Decision and Order on Challenge, Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Adjudicative Facts, Order of Recommitment with Instructions to Special Master Cushman*, Subcase Nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L, and 36-00003M, at 41-42 (11/23/1999). In their Response to Petitions for Rehearing, the SWC acknowledges that IDWR is required in times of shortage to limit the Twin

Falls Canal Company to an amount that can be "beneficially used within the authorized diversion rates." See *SWC Response to Petitions for Rehearing*, at p. 7. In other words, an adjudicated water right sets forth the "maximum" authorized diversion of water; however, the diversion may be administered in times of shortage to further limit it to an amount that can be "beneficially used." This is not a new or novel proposition. See *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007) ("If the Court were to rule that the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water."); *American Falls Reservoir Dist. No. 2*, 143 Idaho at 877, 154 P.3d at 448 ("reasonableness is not an element of a water right; thus, the evaluation of whether a diversion is reasonable in the administration context should not be considered a re-adjudication.").

In this case, the Director has recommended in the adjudication of TFCC's water right a maximum authorized headgate delivery of 3/4 inch. However, in the administration of this water right, the Director has found that TFCC can only beneficially use a headgate delivery of 5/8 inch. There is a clear distinction between (1) a maximum authorized diversion and (2) an amount that can be beneficially used. Because of this distinction, there is no inconsistency between the Director's recommendation in the adjudication of the water right and the Director's finding of beneficial use in the administration of the water right. The SWC's arguments to the contrary must be rejected.

The Ground Water User's request that the Court hold as a matter of law that Twin Falls Canal Company's material injury is limited to the amount of water it can beneficially use and,

based thereon, affirm the Directors finding that the amount beneficially used by Twin Falls Canal Company is limited to a headgate delivery of 5/8 inch.

**III. Due Process demands that a hearing be held with regard to the extent of material injury and the adequacy of a mitigation plan *before* junior ground water users are curtailed.**

Astonishingly, the Surface Water Coalition ("SWC") likens the Ground Water Users' previously decreed and licensed water rights to those of an unadjudicated surface water right and argues that the Ground Water Users deserve no due process. *SWC Response to Petitions for Rehearing*, at p. 9 (there is no notice or hearing prior to shutting off unadjudicated water rights and the "same procedure applies to junior priority adjudicated and licensed water right...."). The SWC relies on *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977) for their argument. Yet, they ignore the important holding in *Nettleton* that specifically acknowledges that: "[I]ndividual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the State." *Nettleton*, 98 Idaho at 90, 558 P.2d at 1051. As this Court is well aware, curtailment of junior groundwater rights is not something that occurs late in the irrigation season to fill a downstream senior water right holder; rather, curtailment of junior groundwater rights contemplates complete curtailment for an entire irrigation season and perhaps permanently. These facts make it obvious that, prior to suffering a complete loss of their real property rights, junior groundwater users are entitled to due process before their property is taken and livelihoods permanently altered.

The SWC relies on Conjunctive Management Rule ("CM Rules") 40 to argue that such hasty and permanent action is required when a Water District exists. However, upon close and fair reading of the CM Rules, and Rule 40 specifically, it is apparent that first a determination of material injury and reasonable use of water diversion must occur before the watermaster has authority to curtail the junior user. "[U]pon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster shall [regulate use of water by




junior-priority ground water users].” CM Rule 40.01. Hence, the finding of material injury must be made first and that is when junior groundwater users must be afforded due process. The junior groundwater users must be given an opportunity for a hearing on the extent of material injury, if any, and an opportunity to provide mitigation water prior to the actual curtailment that could potentially follow a material injury finding.

Further, the Surface Water Coalition’s argument essentially amounts to a “shut and fasten” priority only administration which is simply not applicable in the conjunctive management context. While strict priority administration has a place in surface water administration under Idaho law, it is not the law when it comes to evaluating the impact of junior groundwater rights on senior surface water rights and thus, the process for administration requires additional due process requirements to protect all interests involved. *See Idaho Code § 42-101; American Falls Reservoir Dist. No. 2*, 143 Idaho at 876-78, 154 P.3d at 447-49.

This process is what the Ground Water Users are requesting that the Court clarify in its *Order on Petition for Judicial Review* dated July 24, 2009. The Ground Water Users are requesting clarification that due process requires that a hearing on the extent of material injury caused by junior-priority groundwater users and on a proposed mitigation plan must be held *before* the physical curtailment of junior groundwater users. Specifically, the Ground Water Users request that the Court clarify the due process requirements and find that junior groundwater users must be afforded notice and a hearing prior to actual physical curtailment on the issues of material injury and required mitigation.

DATED this 30<sup>th</sup> day of November, 2009

  
\_\_\_\_\_  
RANDALL C. BUDGE  
CANDICE M. McHUGH

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30<sup>th</sup> day of November, 2009, the above and foregoing document was served in the following manner.

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RANDALL C. BUDGE  
CANDICE M. MCHUGH

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

DEPUTY

A&B IRRIGATION DISTRICT, AMERICAN )  
FALLS RESERVOIR DISTRICT #2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY and TWIN FALLS CANAL )  
COMPANY, )

CASE NO. CV-2008-551

Petitioners, )

vs. )

GARY SPACKMAN, in his capacity as Interim )  
Director of the Idaho Department of Water )  
Resources, and THE IDAHO DEPARTMENT OF )  
WATER RESOURCES, )

Respondents. )

IN THE MATTER OF DISTRIBUTION OF )  
WATER TO VARIOUS WATER RIGHTS )  
HELD BY OR FOR THE BENEFIT OF A&B )  
IRRIGATION DISTRICT, AMERICAN FALLS )  
RESERVOIR DISTRICT #2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY and TWIN FALLS CANAL )  
COMPANY )

**CITY OF POCATELLO'S REPLY BRIEF  
IN SUPPORT OF PETITION FOR REHEARING**

On Appeal from the Idaho Department of Water Resources

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Honorable John M. Melanson, Presiding

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The City of Pocatello, by and through undersigned counsel hereby submits this Reply in support of its Petition for Rehearing. Pocatello's Petition for Rehearing requests that the Court clarify its holding on page 30 of the Court's July 24, 2009 Order on Petition for Judicial Review to include the following language (underlined):

While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such but nonetheless upheld the constitutionality of these rules in *APRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users. For procedural purposes, the hearing held in this matter met the requirements of the CMR and due process insofar as it provided the opportunity for a hearing on the Director's injury finding; prospectively, in order to provide all participants with due process and an opportunity to be heard on the issue of replacement water, IDWR may hold a hearing on the adequacy of the juniors' replacement supplies pursuant to the procedure outlined in the CMR to provide timely replacement water in the amounts specified in the Director's May 2, 2005 Amended Order.

City of Pocatello's Opening Brief in Support of Petition for Rehearing, p. 3.

The injury amounts established in the Director's May 2, 2005 Order were affirmed by the Hearing Officer in this matter after a three week hearing from January 18 through February 5, 2008 ("2008 Hearing") regarding the methodology that the Director used to determine injury (referred to as "Minimum Full Supply"). The Hearing Officer's April 29, 2008 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation ("Hearing Officer's Recommendation"), R.p. 007048-007118, discusses how the Director's methodology for determining material injury should be altered in future calls; it does not find fault with the Director's May 2, 2005 injury amounts retrospectively. The Court should clarify its Order on Petition for Judicial Review instructing IDWR that the process remaining in the matter before the Court, namely the call initiated by the SWC in January 2005, is a hearing pursuant to CMR 43 on the adequacy of junior mitigation supplies to meet the injury amounts established in the Director's May 2, 2005 Order.

Contrary to the contentions of the SWC in its Response to Petitions on Rehearing, a party does not have to file an appeal of a final order in order to affirm the Director's findings. Cf. Surface Water Coalition's Response to IGWA's and City of Pocatello's Petitions for Rehearing, p. 13. SWC's Petition for Judicial Review did not raise a challenge to the injury amounts established in the May 2, 2005 Order. Instead, the SWC raised the narrow issue of "[w]hether the Director gave proper weight and deference to the SWC's decreed senior water rights." Order on Petition for Judicial Review, p. 15.<sup>1</sup> Because the SWC did not challenge the Director's affirmation of the injury amounts set in the May 2, 2005 Order, that holding has been affirmed and the Court should clarify that the SWC is estopped from attempting to rejudicate the matter in the final proceeding to be completed in this case, namely a CMR 43 hearing on the adequacy of junior mitigation supplies.

**1. The Injury Amounts in the May 2, 2005 Order were adopted by the Director's 2008 Final Order and not the subject of Petitioner's appeal before the Court.**

As the Director noted in his Final Order, "[t]he foundational findings made by the former Director in the May 2005 Order are the subject of much at issue in this proceeding." Director's Final Order Regarding the Surface Water Coalition Delivery Call, September 5, 2008 ("Final Order"), R p. 007382, ¶ 3. The May 2, 2005 Order found that junior water pumping had caused material injury to the SWC, and utilized a "minimum full supply" standard in predicting material injury. R p. 001382-001385. The SWC appealed the May 2, 2005 Order (and interim orders entered prior to the hearing in this matter) on the ground that the injury amounts determined by the Director were erroneous. After a three week trial in January of 2008, the Hearing Officer disagreed.

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<sup>1</sup> As discussed in Pocatello's Brief in Support of Rehearing, the SWC has repeatedly sought delivery of its water rights based on the amounts of water in its licenses and/or decrees, disregarding fundamental principles of Idaho water law. See City of Pocatello's Opening Brief in Support of Petition for Rehearing, p. 5 n.1.



In his Order, the Hearing Officer rejected the SWC challenges to the Director's injury determinations made in the May 2, 2005 and interim orders, but also outlined requirements that IDWR must use in the future to determine material injury amounts:

The attempt to project the amount of water that is necessary for the members of SWC to fully meet crop needs within the licensed or decreed amounts is an acceptable approach to conjunctive management, but there have been applications of the concept of a minimum full supply that should be modified if the use of the protocol is to be retained.

....

[T]here should be adjustments if the process of establishing a base different from the licensed amount is to be utilized in future administration.

Hearing Officer's Recommendation, R p. 007091, ¶ 8 & R p. 007386, ¶ 23 (emphasis added, internal citation omitted).<sup>2</sup> The Hearing Officer's analysis was forward-looking in nature:

"[T]he Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water for projecting material injury." R p. 007098, ¶ 7 (emphasis added).

The Hearing Officer's Recommendation rejected SWC's challenges to the Director's determinations of injury in the May 2, 2005 Order and affirmed those amounts. R p. 007071, ¶ 12 ("Unless modified explicitly or by necessity from the recommendation in this opinion, the findings and conclusions of the Director's in the various Orders are accepted.").

"Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42." Final Order, R p. 007388, ¶ 7; May 2, 2005 Order, R p. 001401, ¶ 47. The Director adopted and made final, for purposes of this appeal, the injury amounts established in his May 2, 2005 Order. "[T]he findings of fact and conclusions of law entered by the former Director and the Hearing Officer in these matters, unless discussed and

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<sup>2</sup> For example, the Hearing Officer found that any future determination of injury by IDWR must utilize a methodology that is flexible in nature in order to accurately determine injury in response to changing conditions. Hearing Officer's Recommendation, R p. 007093-007094, ¶ 8.e. & R p. 007098, ¶ 7 ("The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol.").

modified in this FINAL ORDER, are hereby accepted. All other requests for relief, unless specifically discussed herein are hereby denied." R p. 007392.

This Court has also made findings related to the Director's Order regarding *future* methodologies for purposes of determining injury. However, the amounts of water that were determined to be injurious by Director Dreher in the pre-hearing administrative orders and affirmed by Justice Schroeder were not challenged by the SWC—except insofar as the SWC again asserted that it was entitled to the full decreed amounts on the face of its water rights. That challenge, like the ones made by the SWC to the Director and the Hearing Officer, failed. To wit; that "depletion does not equate to material injury." Final Order, R p. 007388 ¶ 7; May 2, 2005 Order, R p. 1401, ¶ 47.

The fact that the Department, in an attempt to address the problems identified with the Minimum Fully Supply procedures identified by Hearing Officer Schroeder and the Director's Final Order, issued the 2008 Protocol during the pendency of this appeal amounts only to the agency getting ahead of the script. It was on this basis that the Court found *untimely* the Department's issuance of a new protocol. See Order on Petition for Judicial Review, p. 32, ¶ V.F.. By the same token, the Court determined that the Director's determination regarding the scope of Department discretion to determine carryover was incorrect, not that the amounts of carryover were incorrect.<sup>3</sup> What was before the Court in this appeal was the methodology that IDWR will use *prospectively* to determine injury to carryover storage in the future, and the Court's determinations did not disturb the Director's determinations of injury either to water rights or carryover storage reflected in the May 2, 2005 Order. The SWC cannot try to reverse the Director's affirmance of these amounts by raising the issue now in an untimely manner.

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<sup>3</sup> The Court found "that permitting carry-over for more than just the next season is categorically unreasonable . . . . [Instead, the Director] can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call." Order on Petition for Judicial Review, p. 22 (emphasis added).

2. **The remaining procedure in the calls initiated by the SWC in 2005 is a Rule 43 hearing on whether the mitigation supplies of junior water users are adequate to meet the injury requirements of the SWC, as established in the May 2, 2005 Order.**

The Court should clarify that the remaining process to be afforded to participants is a hearing *solely* on the issue of the reliability of the juniors' proffered replacement water pursuant to CMR 43. Indeed, the Hearing Officer stated in his Recommendation that the determination of minimum full supply (as established in the May 2, 2005 Order) is also a determination of the amount of necessary water for mitigation of injury purposes. R p. 007087, ¶ 3 ("The amount determined to be a minimum full supply affects the determination of whether there is material injury from ground water pumping and the extent of mitigation if there is material injury.") (emphasis added). When a mitigation plan filed under CMR 43 is contested, there are two issues to be resolved at the hearing: (1) what amount of water is necessary to avoid injury, and (2) whether the junior ground water user acquired an adequate supply for that purpose. The first question was determined at the 2008 hearing conducted by the Hearing Officer.

Contrary to the assertions of the SWC, this Court, in its role as a court of appeal in this matter, is to instruct the agency upon remand which issues have been affirmed and which require further proceedings by the agency. Idaho Code section 67-5279(2)(d) requires that "[i]f the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." Part of the Court's role in remanding is to provide guidance on future proceedings to ensure that the agency acts in accordance with the Court's decision.

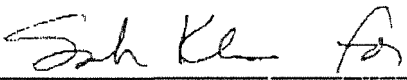
#### CONCLUSION

In this matter, the parties have been accorded the opportunity for a hearing regarding the first inquiry the Director's determination regarding the magnitude and amount of the SWC injury due to ground water pumping. The SWC's appeal of this determination was limited to its assertion that it is entitled to the amount of water represented on the face of its decrees and


licenses. The Hearing Officer, Director and this Court have rejected the SWC's argument. A CMR 43 hearing regarding the Ground Water Users' replacement supplies cannot turn into yet another opportunity for the SWC to revisit the injury determination already made through the 2008 Hearing. To hold otherwise would allow rehearing on injury amounts in the proceeding initiated by the SWC in 2005. That issue has already been determined, and under the doctrine of res judicata, must be enforced. Therefore, because the injury amounts found in the Director's May 2, 2005 Order were affirmed by the Director and not appealed by the SWC, the final step to complete the procedure afforded to parties in the current proceeding before the Court is an Order remanding the matter to IDWR for a hearing on the adequacy of the mitigation supplies to be provided by junior appropriators. The SWC has a right to a hearing on the adequacy of the replacement supplies acquired by the Ground Water Users, and nothing more.

Respectfully submitted this 30<sup>th</sup> day of November, 2009.

CITY OF POCATELLO ATTORNEY'S OFFICE

By   
A. Dean Tranmer

WHITE & JANKOWSKI

By   
Sarah A. Klahn

Attorneys for City of Pocatello

### CERTIFICATE OF SERVICE

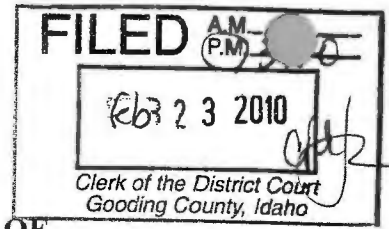
I hereby certify that on this 30<sup>th</sup> day of November, 2009, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Reply Brief in Support of Petition for Rehearing in Case No. CV-2008-0000551** upon the following by the method indicated:

*Sarah Klahn*

Sarah Klahn, White & Jankowski, LLP

Cynthia R. Eagle-Ervin, Deputy Clerk Gooding County District Court 624 Main St Gooding ID 83330	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail - Federal Express <input checked="" type="checkbox"/> Facsimile - 208-934-4408 - Phone - 208-934-4861 <input type="checkbox"/> Email
Courtesy Copy to: Judge John M. Melanson SRBA PO Box 2707 Twin Falls ID 83303-2707	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-736-2121 <input type="checkbox"/> Email
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Ken Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318 wkf@fpl.org	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile - 208-878-2548 <input checked="" type="checkbox"/> Email
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Kathleen Carr US Dept Interior, Office of Solicitor 960 Broadway Ste 400 PO Box 4169 Boise ID 83706 <a href="mailto:kmarionecarr@yahoo.com">kmarionecarr@yahoo.com</a>	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile -- 208-334-1918 <input checked="" type="checkbox"/> Email
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE JOHN M. MELANSON  
Presiding Judge  
LINDA LEDBETTER  
Court Reporter  
JULIE MURPHY  
Deputy Clerk

02/22/10  
1:30 p.m.

Court Minutes

SRBA District Courtroom  
Via Video Conferencing @ IDWR

Twin Falls, Idaho  
Boise, Idaho

This was the time and place set for **Case No. CV 2008-0000551**. Issues to be addressed are:

**RE-HEARING ON ORDER FOR PETITION FOR JUDICIAL REVIEW**

<b>TAPE</b>	<b>DESCRIPTION</b>
1:33:57	COURT CONVENES  Appearances: Sarah Klahn, John Simpson, Tom Arkoosh, Kent Fletcher, Candice Mc Hugh, Randy Budge, Chris Bromley, Phil Rassier, David Gehlert, Michael Creamer  Court summarizes
1:36:51	Ms. McHugh addresses court
1:37:44	Mr. Bromley addresses court – requests to issue order in 60 to 90 days and requests court hold case “in abeyance” until order is issued
1:40:50	Court questions Ms. Mc Hugh – she responds
1:41:30	Court questions Mr. Bromley – he responds
1:42:51	Mr. Simpson addresses court – Mr. Bromley responds
1:45:15	Court questions Mr. Rassier – Mr. Bromley responds
1:46:08	Mr. Arkoosh addresses court

1:47:18 Mr. Fletcher addresses court  
1:48:04 Mr. Bromley responds  
1:48:20 Court questions Mr. Fletcher / he responds  
1:48:51 Mr. Simpson questions Mr. Bromley / he responds  
1:51:44 Ms. Mc Hugh addresses court / Mr. Simpson responds  
1:54:04 Mr. Bromley comments  
1:56:09 Mr. Arkoosh questions Mr. Bromley / he responds  
1:57:43 Ms. Klahn addresses court  
1:59:51 Court comments  
2:01:04 Ms. Mc Hugh readdresses court on next issues  
2:09:41 Ms. Klahn readdresses court  
2:12:08 Mr. Fletcher readdresses court  
2:16:31 Court questions Mr. Bromley / he responds  
2:16:58 Mr. Simpson readdresses court  
2:22:47 Mr. Arkoosh readdresses court  
2:29:46 Ms. Mc Hugh readdresses court  
2:35:10 Ms. Klahn readdresses court  
2:38:44 Mr. Arkoosh readdresses court  
2:39:17 Mr. Bromley readdresses court  
2:40:31 Mr. Arkoosh readdresses court / Mr. Bromley responds  
2:42:22 Ms. Klahn readdresses court  
2:43:52 COURT WILL TAKE MATTER UNDER ADVISEMENT AND ISSUE  
WRITTEN DECISION  
2:44:13 COURT ADJOURNS



DISTRICT COURT  
GOODING CO. IDAHO  
FILED

2010 MAR -4 PM 3: 32

GOODING COUNTY CLERK

BY: IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODINGA&B IRRIGATION DISTRICT, )  
AMERICAN FALLS RESERVOIR )  
DISTRICT #2, BURLEY IRRIGATION )  
DISTRICT, MILNER IRRIGATION )  
DISTRICT, MINIDOKA IRRIGATION )  
DISTRICT, NORTH SIDE CANAL )  
COMPANY and TWIN FALLS CANAL )  
COMPANY, )UNITED STATES OF AMERICA )  
BUREAU OF RECLAMATION, )

Petitioners, )

vs. )

IDAHO DAIRYMEN'S ASSOCIATION, )  
INC., )

Cross-Petitioner, )

vs. )

GARY SPACKMAN, in his capacity as )  
Interim Director of the Idaho Department )  
of Water Resources,<sup>1</sup> and THE )  
DEPARTMENT OF WATER )  
RESOURCES, )

Respondents. )

IN THE MATTER OF DISTRIBUTION )  
OF WATER TO VARIOUS WATER )  
RIGHTS HELD BY OR FOR THE )

Case No. 2008-000551

ORDER STAYING DECISION  
ON PETITION FOR  
REHEARING PENDING  
ISSUANCE OF REVISED FINAL  
ORDER<sup>1</sup> Director David R. Futhill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director, I.R.C.P. 25 (d) and (e).

BENEFIT OF A&B IRRIGATION )  
 DISTRICT, AMERICAN FALLS )  
 RESERVOIR DISTRICT #2, BURLEY )  
 IRRIGATION DISTRICT, MILNER )  
 IRRIGATION DISTRICT, MINDOKA )  
 IRRIGATION DISTRICT, NORTH SIDE )  
 CANAL COMPANY, AND TWIN FALLS )  
 CANAL COMPANY. )

---

# I.

## PROCEDURAL BACKGROUND AND FACTS

On July 24, 2009, this Court issued its *Order on Petition for Judicial Review* in the above-captioned matter. In its *Order*, this Court held that the Director of the Idaho Department of Water Resources ("Director" or "IDWR") abused discretion by issuing two *Final Orders* in response to Hearing Officer Schroeder's *Recommended Order* of April 29, 2008. Specifically, this Court held that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover. On August 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District timely filed a *Petition for Rehearing* on the Court's July 24, 2009 *Order*. On August 14, 2009, the City of Pocatello also timely filed a *Petition for Rehearing*.

In its *Response Brief on Rehearing*, and at oral argument on the petitions for rehearing on February 23, 2010, IDWR stated that there is sufficient information for the Director to issue an order determining material injury to reasonable in-season demand and reasonable carryover, without conducting a hearing or requiring additional information from the parties. However, IDWR requested thirty to sixty days to develop a new methodology, apply that methodology to the facts on the record, and issue an order in accordance with this Court's previous holding. IDWR proposed that this Court hold in abeyance its decision on rehearing, until the Director issues the new order and the time for filing a motion for reconsideration and a petition for judicial review of the order has expired.

It is this Court's understanding that all parties were in agreement as to the Court holding in abeyance a final order on **all of the issues** presented on rehearing. As such, at

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this time, the Court will not issue a final decision on rehearing. However, in the event this Court misunderstood the respective positions of the parties, the parties have seven (7) days to file a notice with the Court, indicating any objection to holding in abeyance a final order on all of the issues presented on rehearing.

## II.

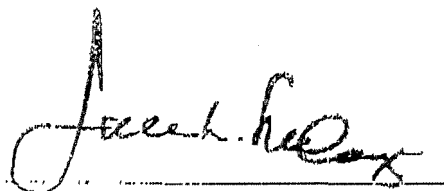
### ORDER

Therefore, based on the foregoing, the following are hereby ORDERED:

1. The Director of IDWR shall issue a *Final Order* determining material injury to reasonable in-season demand and reasonable carryover by **March 31, 2010**.
2. Pursuant to I.A.R. 13(b)(14), this Court shall hold in abeyance any final decision on rehearing until such an order is issued and the time periods for filing a motion for reconsideration and petition for judicial review of the new order have expired.
3. Parties have seven (7) days from the entry of this *Order* to submit a notice to this Court, indicating any objection to the Court holding in abeyance a final order on rehearing.

IT IS SO ORDERED.

Dated March 4, 2010



JOHN M. MELANSON  
District Judge, *Pro Tem*.

## NOTICE OF ORDERS

I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 4 of March 2010, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order Staying Decision on Petition for Rehearing...to the parties listed below via the U.S. Postal Service, postage prepaid:

John Simpson  
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Travis Thompson  
BARKER ROSHOLT & SIMPSON  
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Randy Budge  
Candace McHugh  
RACINE OLSON  
P.O. Box 1391  
Pocatello, ID 83204-1391

Dated: March 4, 2010

  
\_\_\_\_\_  
Cynthia R. Eagle-Ervin, Deputy Clerk

1 631

Resources, and THE IDAHO DEPARTMENT )  
 OF WATER RESOURCES, )

Respondents. )

\_\_\_\_\_)  
 )  
 IN THE MATTER OF DISTRIBUTION OF )  
 WATER TO VARIOUS WATER RIGHTS )  
 HELD BY OR FOR THE BENEFIT OF A&B )  
 IRRIGATION DISTRICT, AMERICAN )  
 FALLS RESERVOIR DISTRICT #2, )  
 BURLEY IRRIGATION DISTRICT, )  
 MILNER IRRIGATION DISTRICT, )  
 MINIDOKA IRRIGATION DISTRICT, )  
 NORTH SIDE CANAL COMPANY, AND )  
 TWIN FALLS CANAL COMPANY )  
 \_\_\_\_\_)

A & B Irrigation District (A & B), American Falls Reservoir District #2 (AFRD2), Burley Irrigation District (BID), Milner Irrigation District (Milner), Minidoka Irrigation District (MID), North Side Canal Company (NSCC), and Twin Falls Canal Company (TFCC) (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through their undersigned counsel, file this Objection to that Order Staying Decision on Petition for Rehearing dated March 4, 2010, pursuant to the terms of that Order.

As one of the issues raised by the Ground Water Users (GWU) in their *Petition for Rehearing*, the GWU argued that there were sufficient facts and evidence in the record for IDWR to issue an order establishing the methodology for determining material injury and reasonable carryover without holding any additional hearings. At the oral argument on the Petitions for Rehearing held February 23, 2010, it was the understanding of the SWC that rather than rule on this issue, all parties agreed that the Court could forego rendering a decision on this issue until the Director issues a *Final Order* determining material injury to reasonable in season demand and reasonable carryover by March 31, 2010.

However, the SWC also understood that the Court would issue an additional order addressing other issues on rehearing, particularly the issue pertaining to whether the Director, once an injury

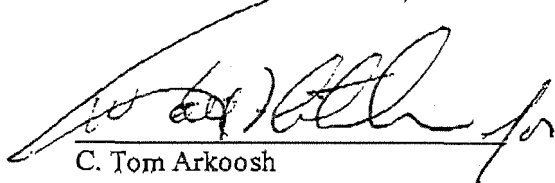
SWC OBJECTION TO ORDER STAYING DECISION

determination is made, has discretion to require a hearing prior to administration of junior ground water rights. It is critical that the Court address this issue prior to the upcoming irrigation season.

The issue is fully briefed by all parties. The SWC requests that the Court render a decision on the "discretion to require a hearing before administration" issue and remand the decision of the Court to the Director so that the Director can incorporate the Court's determination into the *Final Order* that is due on March 31, 2010.

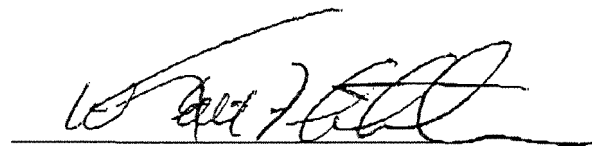
DATED this 10<sup>th</sup> day of March, 2010.

**CAPITOL LAW GROUP, PLLC**



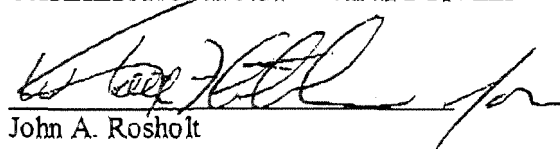
C. Tom Arkoosh  
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District #2*

**FLETCHER LAW OFFICE**



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Paul L. Arrington  
*Attorneys for A&B Irrigation District, Burley  
Irrigation District, Milner Irrigation District,  
North Side Canal Company, Twin Falls Canal  
Company*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2010, I served true and correct copies of the *Surface Water Coalition's Objection to Order Staying Decision* upon the following by the method indicated:

Deputy Clerk  
Gooding County District Court  
624 Main St.  
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Gooding, Idaho 83330

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☐ Overnight Mail  
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SWC OBJECTION TO ORDER STAYING DECISION

4



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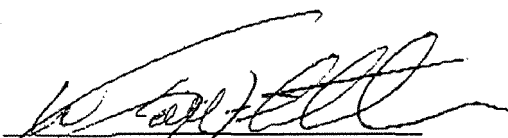
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☐ Email

  
W. Kent Fletcher

DISTRICT COURT  
GOODING CO. IDAHO  
FILED

2010 MAR 17 PM 4:25

GOODING COUNTY CLERK

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DEPUTY

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Scott J. Smith, ISB No. 6014  
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

A&B IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, and TWIN FALLS  
CANAL COMPANY

UNITED STATES OF AMERICA,  
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

Case No.: CV-2008-0000551

**GROUND WATER USERS' AND  
POCATELLO'S RESPONSE TO SWC  
OBJECTION TO ORDER STAYING  
DECISION**

GARY SPACKMAN, in his capacity as Interim  
Director of the Idaho Department of Water  
Resources,<sup>1</sup> and THE IDAHO DEPARTMENT  
OF WATER RESOURCES

Respondents,

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY AND TWIN FALLS  
CANAL COMPANY

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the "Ground Water Users") and the City of Pocatello ("Pocatello"), file this response to the Surface Water Coalition's *Objection to Order Staying Decision*. The Surface Water Coalition requests that the Court "render a decision on the 'discretion to require a hearing before administration' issue and remand the decision of the Court to the Director so the Director can incorporate the Court's determination into the Final Order that is due on March 31, 2010." What the Surface Water Coalition is really asking is for the Court to decide whether the junior groundwater users get curtailed if the Director finds material injury in his March 31, 2010 Final Order prior to any hearing on that Final Order and prior to a hearing on the Ground Water Users' Mitigation Plan that has been pending since November 9, 2009.

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<sup>1</sup> Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).


The Court should defer any decision on this matter until the Director has issued his Final Order. It is not necessary at this time for the Court to give any further direction to the Director to act on the Surface Water Coalition's request and it would be more appropriate to decide this issue when the Court renders its final ruling on rehearing.

If the Court is inclined to act now on the Surface Water Coalition's Objection, although it seems unnecessary, the practical realities should be considered. As set forth in the Ground Water Users' *Opening Brief on Rehearing* on pages 8-13 and on pages 5 and 6 in their *Reply on Rehearing*, it is important that junior ground water users are afforded an opportunity for hearing before they are physically curtailed. This case shows the practical consequences of not doing so. The Ground Water Districts filed a Mitigation Plan on November 9, 2009 in response to a potential finding of material injury to a member or members of the Surface Water Coalition. The Mitigation Plan was advertised and the Surface Water Coalition and the Bureau of Reclamation protested the Mitigation Plan. However, no hearing was set or action taken by the Department until March 9, 2010, when a status and scheduling conference was held. A hearing on the Mitigation Plan is tentatively set for the last week in May with a second status and scheduling conference and settlement conference set for April 5, 2010.

The *Order Staying Decision on Petition for Rehearing Pending Issuance of Final Order* requires the Director to issue a Final Order determining material injury to reasonable in season demand and reasonable carry-over storage by March 31, 2010. The irrigation season begins on the Eastern Snake Plain on April 1. As such, if the Director finds material injury and an obligation to provide mitigation water or curtailment in his March 31, 2010 Final Order, the Ground Water Users may be left without the ability to irrigate their property because a hearing has not been held on the Final Order or their Mitigation Plan.

The Court's ruling in its *Order on Petitions for Rehearing* in the case of *Clear Springs v. Idaho Dep't of Water Resources*, Civil Case No. 2008-444, (Gooding County), found that neither Idaho Code §42-607 nor the Conjunctive Management Rules preclude the Director from providing a hearing after the material injury determination is made and prior to curtailment. (*Order* at 12.) It is unnecessary in this case to provide further instruction at this time, and it is proper for the Court to wait until the Director issues his March 31, 2010 Final Order to decide the pending issues on rehearing. Indeed, the Court has no obligation to decide the pending rehearing issues before the March 31, 2010. As such, the Ground Water Users and Pocatello request the Court deny the relief sought by the Objection filed by the Surface Water Coalition.

DATED this 17th day of March, 2010

By   
RANDALL C. BUDGE  
CANDICE M. MCHUGH  
*Attorneys for Ground Water Users*

CITY OF POCATELLO ATTORNEY'S OFFICE

By   
A. DEAN TRANMER

WHITE & JANKOWSKI

By   
SARAH A. KLAHN

*Attorneys for City of Pocatello*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17<sup>th</sup> day of March, 2010, the above and foregoing document was served in the following manner.

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Gooding, Idaho 83333

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Judge Melanson (courtesy copy)

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DISTRICT COURT  
GOODING CO. IDAHO  
FILED

2010 MAR 25 PM 2:44

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

GOODING COUNTY CLERK

*R. Tamm*  
DEPUTY

A&B IRRIGATION DISTRICT,  
AMERICAN FALLS RESERVOIR  
DISTRICT #2, BURLEY IRRIGATION  
DISTRICT, MILNER IRRIGATION  
DISTRICT, MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL  
COMPANY and TWIN FALLS CANAL  
COMPANY,

UNITED STATES OF AMERICA  
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION,  
INC.,

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as  
Interim Director of the Idaho Department  
of Water Resources,<sup>1</sup> and THE  
DEPARTMENT OF WATER  
RESOURCES,

Respondents.

IN THE MATTER OF DISTRIBUTION  
OF WATER TO VARIOUS WATER  
RIGHTS HELD BY OR FOR THE

Case No. 2008-000551

ORDER OVERRULING  
OBJECTION TO ORDER  
STAYING DECISION

<sup>1</sup> Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director, I.R.C.P. 25 (d) and (e).

BENEFIT OF A&B IRRIGATION )  
DISTRICT, AMERICAN FALLS )  
RESERVOIR DISTRICT #2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY, AND TWIN FALLS )  
CANAL COMPANY. )

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On July 24, 2009, this Court issued its *Order on Petition for Judicial Review* in the above-captioned matter. In its *Order*, this Court held that the Director of the Idaho Department of Water Resources ("Director" or "IDWR") abused discretion by issuing two *Final Orders* in response to Hearing Officer Schroeder's *Recommended Order* of April 29, 2008. Specifically, this Court held that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover.

After a hearing on *Petitions for Rehearing*, this Court issued its *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*, on March 4, 2010. In its *Order*, the Court ordered the Director to issue a revised *Final Order*, determining material injury to reasonable in-season demand and reasonable carryover by March 31, 2010. The Court ordered a stay of its decision on rehearing until such an order was issued and the time period for filing motions for reconsideration or petitions for judicial review had expired. On March 11, 2010, the Surface Water Coalition ("SWC") filed an *Objection to Order Staying Decision*. On March 17, 2010, the Ground Water Users ("GWU") and the City of Pocatello filed a *Response to the Surface Water Users' Objection*.

SWC argues that the Court should issue a ruling now on the question of whether the Director, once an injury determination has been made, has discretion to require a hearing prior to administration of junior groundwater rights. SWC requests that the Court issue a decision on this issue so that the Director can incorporate the Court's determination into the *Final Order* that is due on March 31, 2010. GWU and Pocatello argue that the SWC request is, in reality, a request that the Court now decide whether the junior groundwater users will be curtailed prior to any hearing on the GWU Mitigation


Plan that has been pending since November 9, 2009, should the Director find material injury in his March 31, 2010 *Final Order*. It is argued that if that occurs, the junior ground water users will be curtailed without a hearing on the Director's *Final Order* or their proposed Mitigation Plan. Based upon their arguments, it appears that SWC, GWU and Pocatello all believe that the Director intends to provide a hearing in the absence of any specific order from this court. The parties are all aware of this Court's decision in its June 19, 2009 *Order on Petitions for Judicial Review* in Gooding County Case No. CV-2008-444, holding that the CMR require a hearing after junior water users submit a mitigation plan and prior to the approval of such plan. The parties are also aware of this Court's *Order on Petitions for Rehearing* in that case, ruling that, to the extent the June 19, 2009 *Order* could be interpreted to *require* that the Director hold a hearing after the material injury determination has been made, that portion of the June 19<sup>th</sup> *Order* was withdrawn. The parties may refer to that decision for some guidance.

However, this case is before the Court on a petition for judicial review of the Director's decision. The Court's function in this case is to review the decisions of the Director and apply the standard of review. Accordingly, this Court will hold the question of whether the Director has discretion to hold a hearing prior to administration of junior ground water rights in abeyance, pending the issuance of the Director's *Final Order*, so that the Director's decision may be reviewed in the context of that *Order*.

Therefore, based on the foregoing, it is hereby ORDERED that, pursuant I.A.R. 13(b)(14) and the Court's previous orders, this Court shall continue to hold in abeyance any final decision on rehearing until the Director issues a *Final Order* and the time periods for filing motions for reconsideration and petitions for judicial review of the new order have expired.

IT IS SO ORDERED.

Dated March 25, 2010

  
JOHN M. MELANSON  
District Judge, Pro Tem.

## NOTICE OF ORDERS

I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 25 of March 2010, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order Overruling Objection to Order Staying Decision...to the parties listed below via the U.S. Postal Service, postage prepaid:

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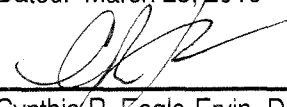
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Dated: March 25, 2010

  
Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders  
Certificate of Mailing  
IRCP 77(d)

646

DISTRICT COURT  
GOODING CO. IDAHO  
FILED

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ATTORNEYS FOR GROUND WATER  
USERS

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

A&B IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY, and  
TWIN FALLS CANAL COMPANY

UNITED STATES OF AMERICA,  
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION,  
INC.,

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as

Case No.: CV-2008-0000551

**CITY OF POCATELLO'S AND  
GROUND WATER USERS' MOTION  
FOR STAY AND TO AUGMENT THE  
RECORD WITH ADDITIONAL  
EVIDENCE**

Interim Director of the Idaho Department of  
Water Resources,<sup>1</sup> and THE IDAHO  
DEPARTMENT OF WATER RESOURCES

Respondents,

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY AND  
TWIN FALLS CANAL COMPANY

The City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, acting for and on behalf of their members ("Ground Water Users") (collectively, "Movants") submit this Memorandum in Support of their Motion to Stay and to Augment the Record with Additional Evidence. Pocatello and the Ground Water Users have requested a hearing on the Director's Director's April 7, 2010 *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order") and the Director's April 29, 2010 *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 and 4)* ("As-Applied Order") (together referred to herein as the "April Orders")<sup>2</sup>.

<sup>1</sup> Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

<sup>2</sup> All the documents and orders referenced herein are publicly available from IDWR and Movants request that the Court take judicial notice of these materials. However, for the convenience of the Court the following materials are provided as Attachments 1-6: Attachment 1: Methodology Order; Attachment 2: As-Applied Order; Attachment 3: Memoranda of Spronk Water Engineers; Attachment 4, Affidavit of Charles Bendecke; Attachment 5, May 10, 2010 Notice of Hearing Regarding 2008 Data; Attachment 6: Order Denying IGWA's Request for Stay and/or Extension of Time etc.

For the reasons stated in the Memorandum in Support filed contemporaneously herewith,  
Movants respectfully request that the Court:

- 1) Order the Department to hold a hearing on all aspects of the Methodology Order and the As-Applied Order with sufficient time for the technical experts to develop opinions and testimony; and
- 2) stay the captioned matter during the interim.

Respectfully submitted, this 12<sup>th</sup> day of May, 2010.

ATTORNEYS FOR CITY OF POCA TELLO



A. Dean Tranmer



Sarah A. Klahn

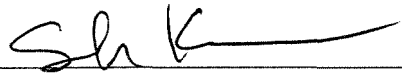
ATTORNEYS FOR GROUND WATER USERS



Candice M. McHugh

# CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of May, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and Ground Water Users' Motion for Stay and To Augment the Record with Additional Evidence** for Case No. CV-2008-0000551 upon the following by the method indicated:

  
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ATTORNEYS FOR THE CITY OF  
POCATELLO

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

A&B IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY, and  
TWIN FALLS CANAL COMPANY

UNITED STATES OF AMERICA,  
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION,  
INC.,

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as

DISTRICT COURT  
GOODING CO. IDAHO  
FILED  
2008 MAY 03 PM 2:56  
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ATTORNEYS FOR GROUND WATER  
USERS

Case No.: CV-2008-0000551

**CITY OF POCATELLO'S AND  
GROUND WATER USERS'  
MEMORANDUM IN SUPPORT OF  
MOTION FOR STAY AND TO  
AUGMENT THE RECORD WITH  
ADDITIONAL EVIDENCE**

Interim Director of the Idaho Department of  
Water Resources,<sup>1</sup> and THE IDAHO  
DEPARTMENT OF WATER RESOURCES

Respondents,

IN THE MATTER OF DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION DISTRICT,  
NORTH SIDE CANAL COMPANY AND  
TWIN FALLS CANAL COMPANY

The City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, acting for and on behalf of their members ("Ground Water Users") (collectively, "Movants") submit this Memorandum in Support of their Motion to Stay and to Augment the Record with Additional Evidence. Pocatello and the Ground Water Users have requested a hearing on the Director's Director's April 7, 2010 *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order") and the Director's April 29, 2010 *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 and 4)* ("As-Applied Order") (together referred to herein as the "April Orders")<sup>2</sup>. For the reasons stated herein, Movants respectfully request that the Court: 1) Order the Department to hold a hearing on all aspects of the Methodology Order and the As-Applied

<sup>1</sup> Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

<sup>2</sup> All the documents and orders referenced herein are publicly available from IDWR and Movants request that the Court take judicial notice of these materials. However, for the convenience of the Court the following materials are provided as Attachments 1-6: Attachment 1: Methodology Order; Attachment 2: As-Applied Order; Attachment 3: Memoranda of Spronk Water Engineers; Attachment 4, Affidavit of Charles Bendecke; Attachment 5, May 10, 2010 Notice of Hearing Regarding 2008 Data; Attachment 6: Order Denying IGWA's Request for Stay and/or Extension of Time etc.

Order with sufficient time for the technical experts to develop opinions and testimony; and 2) stay the captioned matter during the interim.

### SUMMARY OF ARGUMENT

On May 10, 2010, the Director partially granted the Ground Water Users Motion for Hearing by allowing a severely limited hearing on the use of 2008 evidence in the development of the Methodology Order; the Director also allowed a hearing on the As-Applied Order. However, the Director has declined to allow a hearing on the various factual and technical problems with the Methodology Order. *Id.* As it stands now, the Methodology Order is *not* based on the record and, as such, Movants will argue on judicial review that the Methodology Order must be vacated altogether. *See, e.g.,* Technical Memoranda of Spronk Water Engineers; Affidavit of Charles K. Brendecke. Vacation of the Methodology Order will require remand to the agency and water users in Eastern Idaho will again pass an irrigation season without any certainty regarding administration of junior ground water rights.

The more expeditious course is for this Court to order the Department to hold a hearing, pursuant to I.C. § 67-5296, to augment the record regarding the technical and factual problems with the Methodology Order, give the Department a chance to revise the Order in accordance with testimony and evidence received at hearing, and then proceed onto judicial review through the captioned matter. Although this will result in a slight delay in concluding this case, if this Court or the Supreme Court vacates the Methodology Order because it is not based on the record below, the only option is remand to the Department for another hearing and development of yet another injury methodology. The better course of action is to order a hearing pursuant to I.C. § 67-5276 on the full scope of issues related to the Methodology Order and to stay this matter in the interim.

## ARGUMENT

### **I. BACKGROUND**

On July 24, 2009 the Court issued an *Order on Petition for Judicial Review* in the above-captioned matter. The Court found that the Director of the Idaho Department of Water Resources (“Director” or “IDWR”) abused his discretion when he issued two Final Orders in response to Justice Schroeder’s Recommended Order of April 29, 2008 (“Recommendations”). In February 2010, IDWR informed the parties that there was sufficient information in the record “to develop a new methodology, apply that methodology to the facts on the record, and issue an order in accordance with this Court’s previous holding” without an additional hearing with the parties. *Id.* In accepting the Department’s offer to issue a methodology based on the record, the Court recalled its July Order, in which it “held that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover.” *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*, March 4, 2010, at 2. On the strength of IDWR assurances regarding the new methodology, the Court agreed to hold its decision on rehearing in abeyance until:

the time periods for filing a motion for reconsideration and petition for judicial review of the new order [on methodologies to determine injury] have expired.

*Id.*

On April 7, 2010 the Director issued an order announcing a new methodology for determining injury to reasonable in season demand and carryover (the “Methodology Order”). The SWC, Ground Water Users, and the City of Pocatello all filed Petitions for Reconsideration<sup>3</sup> with the Department asking the Director to revise the Methodology Order to comply with the

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<sup>3</sup> The Director did not provide parties with any technical data supporting the Methodology Order until April 21, 2010, the same date that Petitions for Reconsideration were due. This technical information was not provided to the parties before the 2007 hearing in this matter, and the parties have not been afforded an opportunity to have their technical experts fully examine this new evidence—to the extent there is any— and to develop opinions on the Department’s reliance on this information.

record and the Court's orders.<sup>4</sup> However, without regard to these arguments, on April 29, 2010, the Director applied the methods announced in the Methodology Order to the As-Applied Order. The As-Applied Order predicts a shortfall of 84,300 acre-feet to Twin Falls Canal Company and American Falls Reservoir District No. 2. The Director has ordered that junior ground water users secure 84,300 acre feet of storage water to mitigate for the shortage by May 13, 2010, or be curtailed, despite the fact that the amount of water orders is in excess of the amount that could be obtained through curtailment. As-Applied Order at 3; Brendecke Aff.

**II. THE COURT HAS DISCRETION UNDER I.C. 67-5276 TO ORDER THE DEPARTMENT TO HOLD A HEARING REGARDING THE FULL SCOPE OF ISSUES RELATED TO THE METHODOLOGY ORDER AND AS-APPLIED ORDERS.**

The Idaho Administrative Procedures Act, I.C. § 67-5276, provides a means for this Court to order IDWR to take additional evidence to augment the record in this matter. Under the statute:

(1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

I.C. 67-5276.

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<sup>4</sup> On May 7, 2010, the Director issued an *Order Granting Petitions for Reconsideration*, which granted all three pending petitions without any substantive analysis or explanation of the status of the pending matter before the Department.

The court's discretion to evaluate party requests to augment a record is based on these statutory standards. Under *Wohrle v. Kootenai County*, 47 Idaho 267, 207 P.3d 998 (2009), the Idaho Supreme Court reversed the district court's determination to allow augmenting of the record. Although the appellants' request was timely (made at the time the petition for judicial review was filed), the appellants otherwise failed to satisfy the statutory standards above, and because the district court apparently accepted the additional evidence without remanding to the agency, the Court reversed. *Id.* at 270, 1002.

However, unlike the facts in *Wohrle*, the statutory standards are satisfied in this matter, to wit:

- ❖ The request is timely. Under this Court's March 4, 2010 Order, the captioned matter is currently "in abeyance until [the Methodology Order] is issued and time periods for filing petitions for reconsideration and petitions for judicial review have expired". March 4, 2010 Order at page 3. The Department granted the motions to reconsider on May 10, 2010, although it has not yet modified the Methodology Order. As such, the Methodology Order is not yet final for purposes of judicial review, so this request is being made "before the date set for hearing" in this matter.
- ❖ Additional evidence regarding the factual and technical problems with the Methodology Order is "material" to the matter and "relates to the validity of the agency action" in not only issuing the Methodology Order but also in relying upon it to curtail (as of May 13, 2010) over 70,000 acres of ground served by junior wells as well as numerous municipal rights on the ESPA.



- ❖ Movants have good reason for failing to present evidence on the Methodology Order at the 2008 hearing: the Methodology Order was entered on April 7, 2010.
- ❖ The entry of the Methodology Order is a study in agency irregularities, but the most pronounced and most relevant for this Court's consideration is the fact that the Methodology Order is *not* based on the record and thus exceeds the scope of agency discretion on remand.

### III. SPECIFIC PROBLEMS WITH THE METHODOLOGY ORDER THAT A HEARING MIGHT CORRECT

The Department's Methodology Order is not based on the record or the evidence presented by parties, but instead on the concept that:

Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project.

Methodology Order at 15 (emphasis supplied). In a nutshell<sup>5</sup>, the Director's methodology over-estimates SWC crop water demand for the 2010 year by relying not on engineering methodologies or other evidence in the record, but instead by averaging the two most recent years (2006 and 2008) of high "above the historic average" diversions by SWC. Methodology Order at 12 ¶29. The Department's reliance on "unknown parameters" to develop its new methodology is at this point of course "unknown" to the parties. Methodology Order at 15.

The Department's reliance on "unknown parameters" and extra-record evidence rather than knowable objective information is at best contrary to the direction of Hearing Officer Schroeder in this matter, and at worst arbitrary and capricious administration. While Hearing Officer Schroeder found no error in the Department's reliance on average diversions to develop

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<sup>5</sup> See attached technical information submitted by Pocatello and the GWU to supplement their respective Motions to Reconsider.

the "minimum full supply" concept employed in the May 2, 2005 Order, the Hearing Officer specifically held that for purposes of future administration "it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff." Recommendations, page 51 ¶XIV 7. Specifically, the Department was directed to evaluate SWC demand by reference to inputs used in the SWC and/or Pocatello water balance evidence. *Id.* The Department's new methodology, while paying homage to these engineering concepts, rejects them completely in favor of a new version of the 2005 Minimum Full Supply analysis and "unknown parameters".

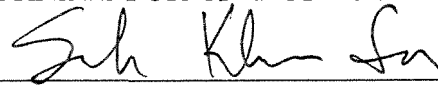
At hearing in this matter, Pocatello and the Ground Water Users will present evidence regarding the factual problems with the new methodology, specifically the over-estimation of SWC crop water demands. The new methodology does not relate to actual crop needs, unreasonably restricts the projected water supply, fails to tie the impact of ground water use on SWC crop needs, and ignores facts related to engineering methodology previously approved by Justice Schroeder.

#### CONCLUSION

For the reasons stated herein, the Movants respectfully request that the Court order the Department to hold a hearing on the full range of issues related to the April Orders and stay the pending appeal of this matter during the interim.

Respectfully submitted, this 12<sup>th</sup> day of May, 2010.

ATTORNEYS FOR CITY OF POCATELLO

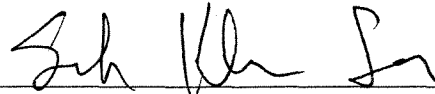


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Sarah A. Klahn

ATTORNEYS FOR GROUND WATER USERS



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LIST OF ATTACHMENTS TO  
CITY OF POCA TELLO'S AND GROUND WATER USERS' MEMORANDUM IN  
SUPPORT OF MOTION FOR STAY AND TO AUGMENT THE RECORD WITH  
ADDITIONAL EVIDENCE

Attachment 1= Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, dated April 7, 2010

Attachment 2 = Order Regarding April 2010 Forecast Supply [Methodology Steps 3 & 4}, dated April 29, 2010

Attachment 3 = Memorandum by Spronk Water Engineers, re: April 7, 2020 IDWR Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, dated April 29, 2010.

Attachment 4 = Affidavit of Charles Brendecke, dated May 6, 2010.

Attachment 5 = Notice of Hearing Regarding 2008 Data, dated May 10, 2010.

Attachment 6 = Order Denying IGWA's Request for Stay and/or Extension of Time; Order Granting Request for Reconsideration and Hearing; Order Authorizing Discovery, in Part; and Notice of Hearing, dated May 10, 2010.

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of May, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's and Ground Water Users' Memorandum in Support of Motion for Stay and To Augment the Record with Additional Evidence [with attachments being sent via U.S. mail]** for Case No. CV-2008-0000551 upon the following by the method indicated:

  
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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER )	
TO VARIOUS WATER RIGHTS HELD BY OR FOR )	<b>FINAL ORDER REGARDING</b>
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	<b>METHODOLOGY FOR</b>
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>DETERMINING MATERIAL</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>INJURY TO REASONABLE</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>IN-SEASON DEMAND AND</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>REASONABLE CARRYOVER</b>
AND TWIN FALLS CANAL COMPANY )	
_____ )	

**FINDINGS OF FACT**

**I. Procedural Background**

1. On September 5, 2008, the Director of the Department of Water Resources ("Director" or "Department") issued a final order in this matter ("2008 Final Order"), in which he ruled on all issues raised at hearing, with the exception of stating his methodology for determining material injury to the Surface Water Coalition's ("SWC") reasonable in-season demand ("RISD") and reasonable carryover. R. Vol. 37 at 7386.<sup>1</sup>

2. On July 24, 2009, the Honorable John M. Melanson issued his *Order on Judicial Review*, which found that the Director's decision to bifurcate his orders was unlawful under the IDAPA. *Order on Judicial Review* at 32. The court remanded this issue "for further proceedings consistent with this decision." *Id.* at 33. Petitions for rehearing were filed by the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively referred to herein as the "IGWA"). At times, this order will refer to IGWA and Pocatello collectively as "ground water users" or "GWU."

3. On March 4, 2010, the court issued its *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*. The order was issued pursuant to Idaho

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<sup>1</sup> For purpose of convenience, all citations in this Final Order are to material that was admitted during the hearing and is part of the final agency record on appeal, which was lodged with the Fifth Judicial District Court on February 6, 2009.



Appellate Rule 13(b)(14) and tasked the Director to issue a final order determining material injury to RISD and reasonable carryover by March 31, 2010. On March 29, 2010, the court extended the deadline to April 7, 2010. *Order Granting Unopposed Motion for Extension of Time to File Order on Remand.*

4. The purpose of this Final Order is to set forth the Director's methodology for determining material injury to RISD and reasonable carryover to members of the SWC.

## **II. Methodology For Determining Material Injury To Reasonable In-Season Demand**

### **A. Background to Reasonable In-Season Demand**

5. The May 2, 2005 Amended Order ("May 2005 Order") and its progeny used the concept of a minimum full supply to quantify the amount of water members of the SWC needed during an irrigation season to ensure a reasonable supply. The minimum full supply was established by reviewing diversion records over a fifteen-year period (1990-2004), and selecting a single year with the smallest annual diversion amount that had full headgate deliveries without leasing any storage space. R. Vol. 37 at 7065. The year that best fit these criteria was 1995. *Id.* at 7066.

6. The May 2005 Order and its progeny were the subject of a fourteen-day hearing before hearing officer Gerald F. Schroeder ("Hearing Officer"). During the hearing, the Department presented its use of the minimum full supply analysis for determining material injury to in-season diversions. The parties presented competing proposals that were based on a water budget method. R. Vol. 37 at 7096.

7. In his April 29, 2008 *Opinion Constituting Findings Of Fact, Conclusions Of Law And Recommendation* ("Recommended Order"), the Hearing Officer stated that he could not reconcile the water budget methods advanced by the parties. R. Vol. 37 at 7096-97. The Hearing Officer stated that "the Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury." R. Vol. 37 at 7098. Reasons for modifying the Director's method were as follows:

Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season. This is the initial concept behind the minimum full supply. The development of an acceptable baseline subject to adjustment for changing conditions retains the value of having senior rights while providing some level of protection against unnecessary curtailment. The concept is good, but the minimum full supply identified by the Director has no defenders from the parties. A brief summary of objections to the Director's minimum full supply can be stated:

- a. It is based on a wet year. To get to an average moisture year an adjustment would be necessary to determine how much greater the minimum full supply would be if the weather equated to an average year when an adequate amount of water was delivered.

b. It is based on a decade old year that does not reflect current efficiencies such as the increased use of sprinkler irrigation and computer monitoring or changes in the amount of land irrigated.

c. It has an emphasis on supply rather than need. That is the amount of water that provided full headgate deliveries. Those may or may not have been needed in that wet year.

R. Vol. 37 at 7096.

8. For purposes of future administration, the Hearing Officer provided the following guidance:

**a. To the extent 1995 is utilized it should be adjusted to determine how much the need for irrigation water was depressed by the well-above average precipitation and how much less loss from evaporation there would have been from depressed temperatures compared to a normal temperature year.** This would result in an increase in the baseline utilized by the Director. The objection that arriving at a baseline by using the amount delivered in a specific year emphasized supply rather than need is worthy of consideration. However, the evidence does not establish waste in the use of water in 1995. Absent evidence of waste it is appropriate to assume that the water was applied to a beneficial use.

**b. If there have been significant cropping changes resulting in either greater or less need for water, those should be factored.** This is an area of caution. Cropping decisions are matters for the irrigators acting within their water rights. Those decisions should be driven by the market. The fact that a particular crop may take less water does not dictate that it be planted.

**c. Changes in facilities, diversion, conveyance, and irrigation practices from earlier years should be considered, e.g. the extent to which conversions to sprinklers have affected water use over time.** This again must be considered with caution to avoid rewriting a water right through the process of determining a baseline water need for predictions of material injury. There may be legitimate reasons to revert to gravity flow in the future or change other practices.

**d. Analysis of soil conditions to determine how water is retained or lost is a factor.** Soil may hold water to be used by crops in the future. The fact that water may be applied to the ground when there are no plants growing does not mean the water is wasted. That depends on the nature of the soil and the amount of soil. Some soil retains water well, other does not. This affects the timing and extent of water delivery.

**e. Non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members.** IGWA has established that at least 6,600 acres claimed by TFCC in its district are not irrigated. Similar information was submitted concerning the Minidoka Irrigation District, indicating that the claimed

acreage of 75,152 includes 5,008 acres not irrigated and Burley Irrigation District has some 2,907 acres of the 47,622 acres claimed not irrigated. These amounts may, of course, change as acreage is removed from irrigation or possibly added back.

**f. Calculation of a water budget should be based on acres, not shares.** The allocation of water within a district is a matter of internal management, but the calculation of a water budget in determining if there will be curtailment should be based on acres not shares.

**g. Full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 inch instead of 3/4 inch.** The former Director accepted Twin Falls Canal Company's response that 3/4 inch constituted full headgate delivery, and TFCC continued to assert that position at hearing. This is contradicted by the internal memoranda and information given to the shareholders in the irrigation district. It is contrary to a prior judicial determination. It is inconsistent with some of the structural facilities and exceeds similar SWC members with no defined reason. Any conclusions based on full headgate delivery should utilize 5/8 inch.<sup>2</sup>

R. Vol. 37 at 7099-7100 (emphasis in original).

9. According to the Hearing Officer, "it is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff." R. Vol. 37 at 7098. In the 2008 Final Order, the Director recognized the Hearing Officer's recommendations and stated his intention of adjusting his future analysis for determining material injury to RISD and reasonable carryover. R. Vol. 39 at 7386.

10. The methodology for determining material injury to RISD and reasonable carryover should be based on updated data, the best available science, analytical methods, and the Director's professional judgment as manager of the state's water resources. In the future, climate may vary and conditions may change; therefore, the methodology may need to be adjusted to take into account a different baseline year or baseline years.

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<sup>2</sup> This recommendation was accepted by former Director Tuthill in his Final Order. R. Vol. 39 at 7392. In his July 24, 2009 *Order on Judicial Review*, Judge Melanson found that the Director exceeded his authority in making this determination. *Order on Judicial Review* at 31. The court based its decision on the filing of the *Director's Report* in the Snake River Basin Adjudication, which "recommend[ed] ¾ of an inch per acre." *Id.* at 31. In its *Opening Brief on Rehearing*, IGWA asked the court to "clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decree (or recommended amount)[.]" This issue has been stayed and held in abeyance until after the Director issues his final order regarding his methodology for determining material injury to RISD and reasonable carryover. *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 3.

**B. Brief Overview of the Methodology for Determining Material Injury to the SWC's Reasonable In-Season Demand and Reasonable Carryover**

11. In-season demand shortfalls will be computed by taking the difference between the RISD and forecast supply ("FS"). Initially RISD will be equal to the historic demands associated with a baseline year or years ("BLY") as selected by the Director, but will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions. The above description is represented by the following equation:

- $\text{In-Season Demand Shortfall} = \text{RISD} - \text{FS}$

12. Reasonable carryover shortfall will be computed by taking the difference between reasonable carryover and actual carryover, where reasonable carryover is defined as the difference between a baseline year demand and projected typical dry year supply.

- $\text{Reasonable Carryover Shortfall} = \text{Actual Carryover} - \text{Reasonable Carryover}$

13. The concepts underlying the selection of the BLY, determination of in-season demand shortfall, and reasonable carryover shortfall will be discussed in detail below.

**C. Reasonable In-Season Demand**

**i. Considerations for the Selection of a Baseline Year**

14. A BLY is a year(s) that represents demands and supplies that can be used as a benchmark to predict need in the current year of irrigation at the start of the irrigation season. The purpose in predicting need is to project an upper limit of material injury at the start of the season.

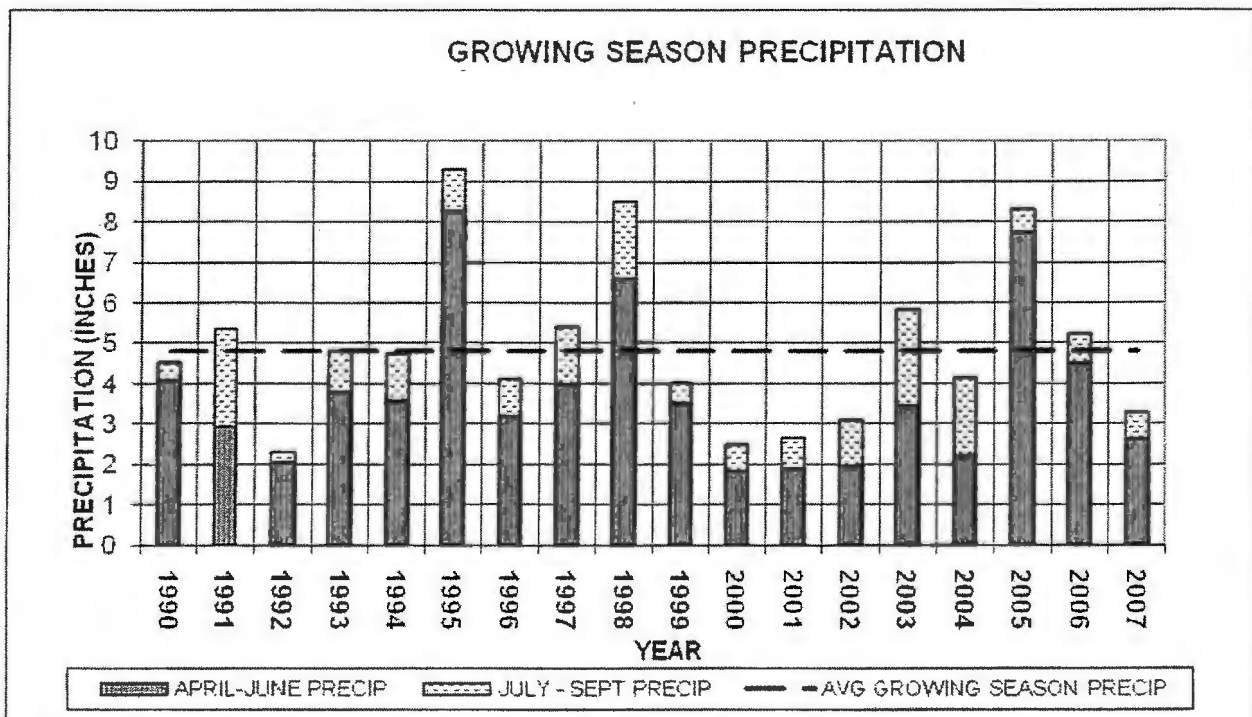
15. A BLY is selected by analyzing three factors: (1) climate; (2) available water supply; and (3) irrigation practices. R. Vol. 37 at 7098. To capture current irrigation practices, identification of a BLY is limited to years subsequent to 1999. *Id.* at 7096.

16. The historic diversion volumes from the BLY, along with the predicted supply forecast at the start of the irrigation season, are used to predict the initial in-season demand shortfall, where demand shortfall is the difference between the BLY demand ("BD") and the FS. Demand shortfall increases in magnitude the greater the difference between BD and FS; demand shortfall increases with increases in BD, decreases in FS, or both. Assuming constant irrigation practices, crop distributions, and total irrigated acres, demand for irrigation water typically increases in years of higher temperature, higher evapotranspiration ("ET"), and lower precipitation. If a year(s) exactly representing average conditions is used for predicting demand shortfall at the start of the season, which turns out to be a high demand season, demand shortfall will be under estimated at the start of the season. Therefore, a BLY should represent a year(s) of above average diversion, and to avoid years of below average diversions. Above average diversion year(s) selected as the BLY should also represent year(s) of above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors. In addition, actual supply (Heise natural flow and storage) should be analyzed to assure that the BLY is not a year of limited supply.

a. Climate

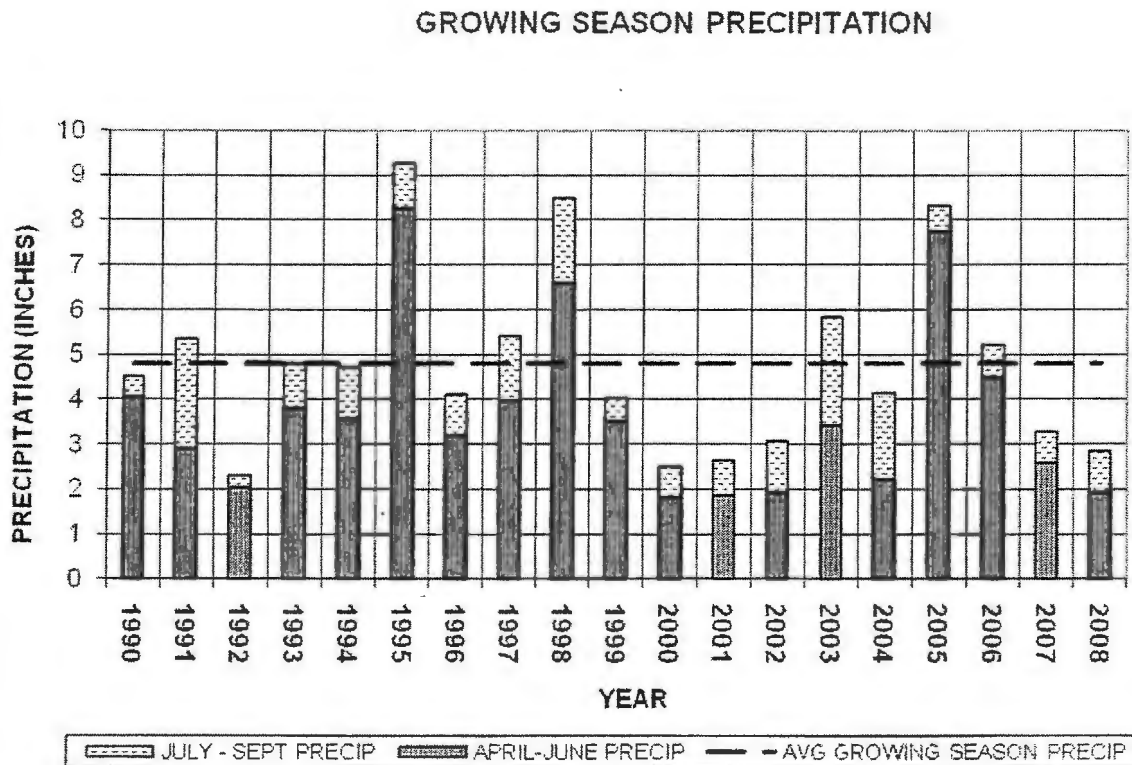
17. For the methods outlined herein, climate is represented by precipitation, ET, and growing degree days.

18. Precipitation. Water, in all phases, introduced to Idaho from the atmosphere is termed precipitation. During the growing season, precipitation has a substantial influence on crop water need both as a source of water to growing crops and as an influencing factor on ET. Ex. 3024 at 19. The figure below shows the precipitation recorded during the growing season at the National Weather Service's Twin Falls weather station. *Id.* at 12. Since 2000, the year 2006 received the nearest to average of growing season precipitation (April through September) relative to the 1990 through 2007 average, with 5.22 inches out of 4.79 inches for the average, or 109% of average. No other years were within +/- 10% of average.



Growing Season Precipitation at Twin Falls Weather Station 1990–2007.<sup>3</sup>

<sup>3</sup> Graph created from raw AgriMet precipitation data. Examples of the use of AgriMet precipitation data in the record may be found at: Ex. 3007 at 21; Ex. 8000, Vol. II at 6-2:6-4; Ex. 8000, Vol. IV at AU-2.



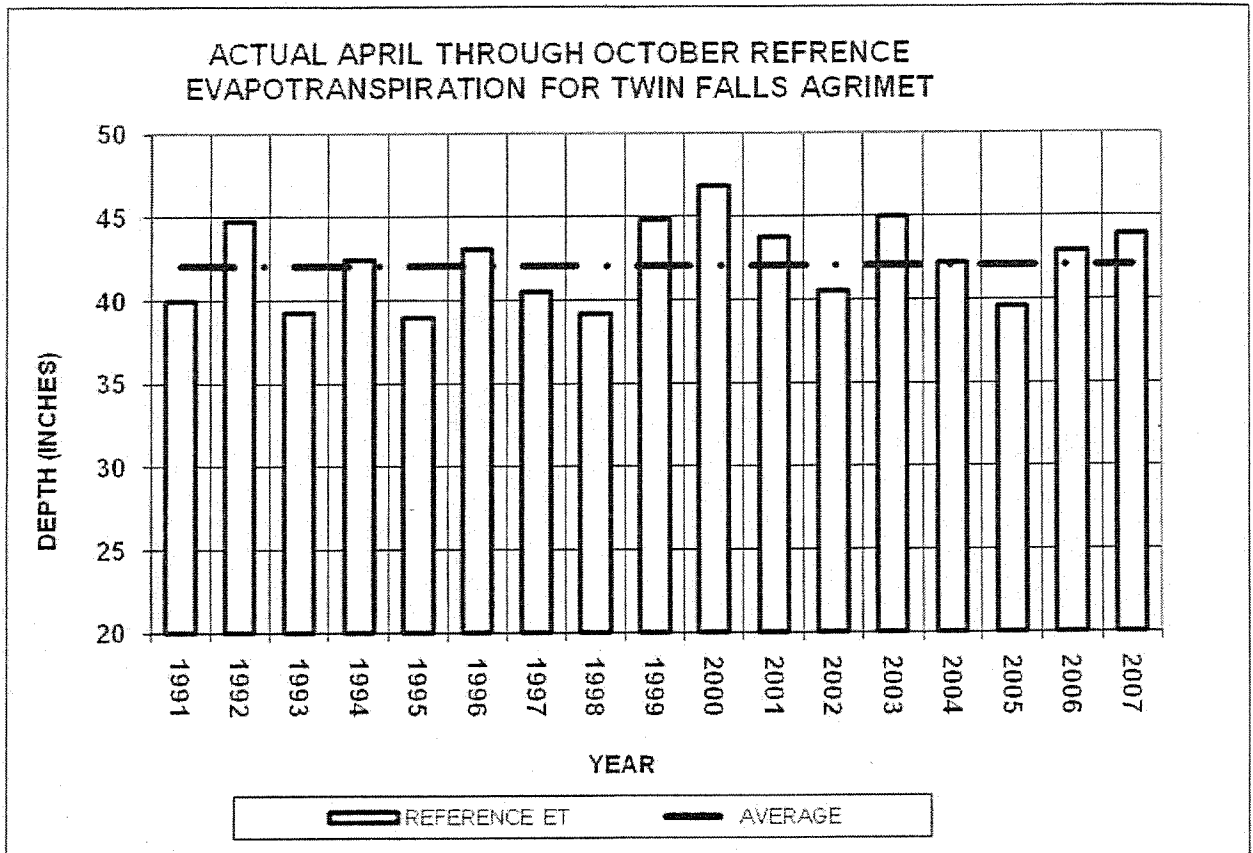
Growing Season Precipitation at Twin Falls Weather Station 1990–2008.<sup>4</sup>

19. Evapotranspiration. ET is a combined variable that describes the amount of water that evaporates from the ground from irrigation and transpires from vegetation. ET is an important factor for properly estimating RISD. In its water budget calculations, the SWC proposed the use of ET values from the USBR as part of their Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. II, Chap. 9; Ex. 8000, Vol. IV, Appdx. AU. The GWU proposed the use of ET values from Allen Richard G. and Clarence W. Robison 2007, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, i.e. ETIdaho. Ex. 3007A at 21; Ex. 3024 at 1-58.

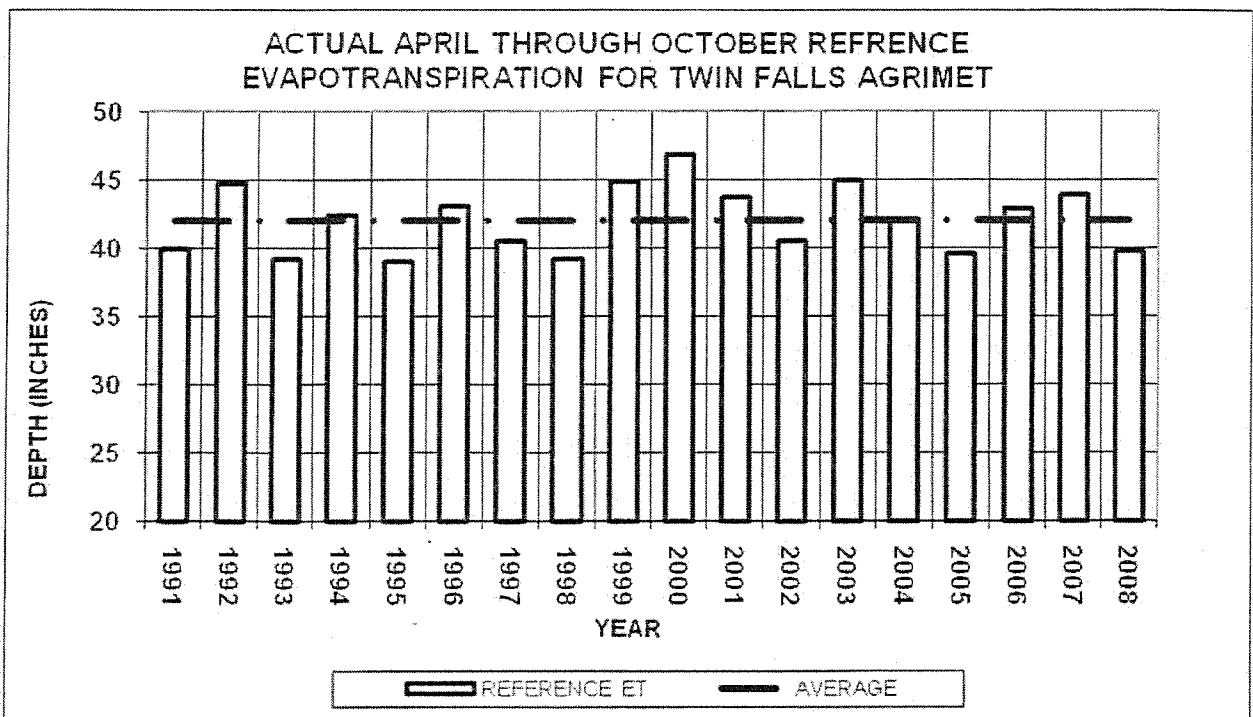
20. The use of reference ET calculated using ETIdaho for the Twin Falls (Kimberly) AgriMet site as an indicator of overall crop water need for a season is appropriate for purposes of comparison of historical average water need between seasons. Similar use of ETIdaho crop irrigation requirement data for AgriMet stations were employed in some of the expert reports submitted during hearing. *See* Ex. 3007 at 21. The ETIdaho method includes the contribution of effective precipitation in the reference ET calculation, and is a strong measure of the actual reference ET as opposed to the traditional potential ET, or the amount of ET the reference crop would use if water were not a limiting factor. ETIdaho is used here for the specific task of selecting appropriate BLY candidates. Total April through October reference ET for the period of record

<sup>4</sup> The record established at hearing was current through the year 2007. Since that time, Water District 01 has finalized its accounting for the 2008 irrigation season; thereby making the use of 2008 data appropriate. Water District 01 has not yet finalized its accounting for the 2009 irrigation season. For purposes of this order, the Director will specifically denote instances in which he uses 2008 data.

from the Twin Falls (Kimberly) AgriMet site is shown below. Since 2000, the years of 2000, 2001, 2003, 2006 and 2007 have been years of above average ET.



Actual Reference ET for Twin Falls (Kimberly) AgriMet using ETIdaho methodology 1991-2007.



Actual Reference ET for Twin Falls (Kimberly) AgriMet using ETIdaho methodology 1991-2008.

21. Growing Degree Days. Growing degree days provide a way to characterize the length and type of growing season. Growing degree days are an arithmetic accumulation of daily mean temperature above a certain base temperature. Ex. 3024 at 10; 117-21. These growth units are a simple method of relating plant growth and development to air temperatures. Different plant species have different base temperatures below which they do not grow. At temperatures above this base, the amount of plant growth is approximately proportional to the amount of heat or temperature accumulated. A higher annual growing degree day value indicates a higher potential rate of plant growth. The table below shows growing degree days accumulated for April through September for the Twin Falls (Kimberly) AgriMet site. Above average years since 2000 include: 2000, 2001, 2002, 2003, 2006, and 2007.

Year	GDD: April- Sept	% of Average	Year	GDD: April- Sept	% of Average
1991	2,095.4	86%	2000	2,591.3	107%
1992	2,610.7	107%	2001	2,600.8	107%
1993	2,004.7	82%	2002	2,465.6	101%
1994	2,516.8	103%	2003	2,585.4	106%
1995	2,257.8	93%	2004	2,428.9	100%
1996	2,418.6	99%	2005	2,320.1	95%
1997	2,478.4	102%	2006	2,601.9	107%
1998	2,422.2	100%	2007	2,657.7	109%
1999	2,294.9	94%			

Average GDD: 2,432.4



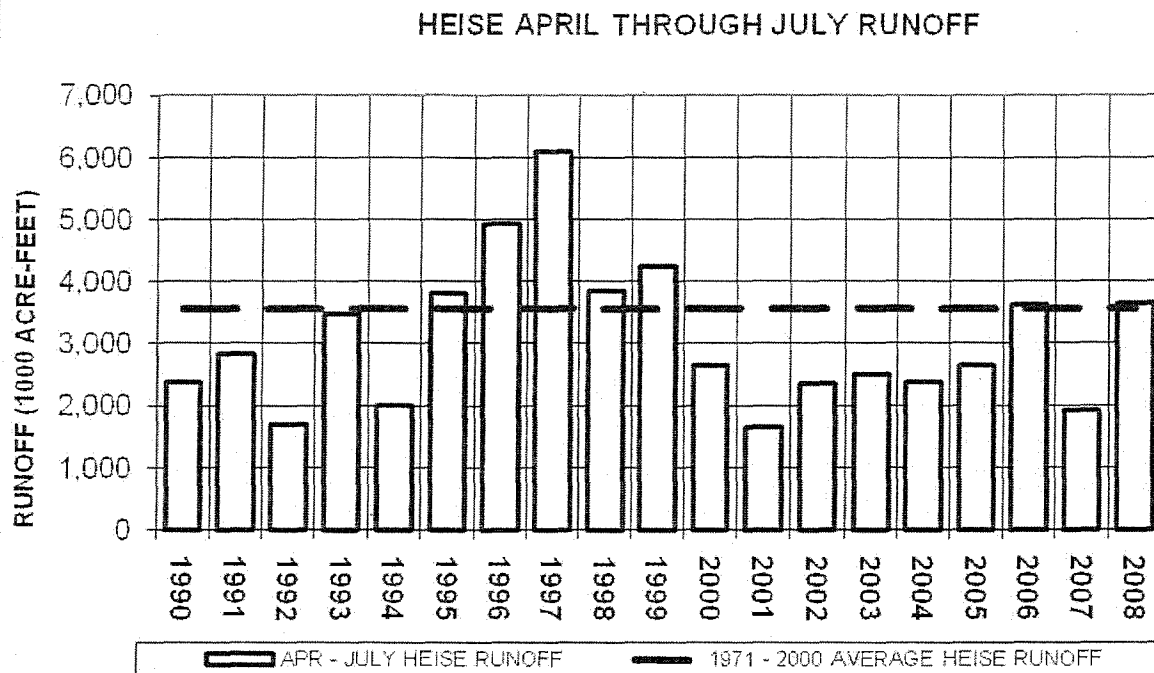
Growing Degree Days ("GDD") for Twin Falls (Kimberly) AgriMet Site 1991-2007, Ex. 3024 at 10.

Year	GDD: April-Sept	% of Average	Year	GDD: April-Sept	% of Average
1991	2,095.4	86%	2000	2,591.3	107%
1992	2,610.7	107%	2001	2,600.8	107%
1993	2,004.7	83%	2002	2,465.6	101%
1994	2,516.8	104%	2003	2,585.4	106%
1995	2,257.8	93%	2004	2,428.9	100%
1996	2,418.6	100%	2005	2,320.1	95%
1997	2,478.4	102%	2006	2,601.9	107%
1998	2,422.2	100%	2007	2,657.7	109%
1999	2,294.9	94%	2008	2,382.9	98%
Average GDD:			2,429.7		

Growing Degree Days ("GDD") for Twin Falls (Kimberly) AgriMet Site 1991-2008.

**b. Available Water Supply**

22. The joint forecast ("Joint Forecast") issued by the United States Bureau of Reclamation ("USBR") and the United States Army Corp of Engineers ("USACE") for the period April 1 through July 31 "is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." R. Vol. 8 at 1379, ¶ 98. The predictions made in this forecast are a good indicator of the total available irrigation water supply for a season. R. Vol. 37 at 7071. The April through July volume represents the amount available for diversion into storage reservoirs and also serves as an indicator of natural flow supplies. *Id.* at 7066. The figure below shows actual unregulated flow volumes at Heise for 2000-2007 and the Joint Forecast volume for 2008. Since the 2000 irrigation season, and recognizing that diversions for each individual member of the SWC are different, 2006 and 2008 are the only years in which water supply was not severely limited. The thirty-year average is indicated by the dashed line.



April through July Unregulated Flow Volume at Heise, 1990-2008. Ex. 8000, Vol. II at 6-37:6-38; R. Vol. 37 at 7018-28 (includes 2008 Joint Forecast projection for Heise).

**c. Irrigation Practices**

23. A BLY must be recent enough to represent current irrigation practices. R. Vol. 37 at 7099-7100. Conditions that should be consistent are the net area of the irrigated crops, farm application methods (flood/furrow or sprinkler irrigation), and the conveyance system from the river to the farm. The type of sprinkler systems should be similar between the BLY and the current year, whether side roll systems, hand lines, or center pivot.

24. Sprinkler systems are currently the predominant application system. *Id.* at 7101-02. In order to ensure that current irrigation practices are captured, selection of a BLY for the SWC should be limited to years subsequent to 1999. *Id.* at 7096; 7099-7100.

25. Estimates of irrigated acres from the hearing show a trend of decreasing irrigated acreage. R. Vol. 28, 5205-15; R. Vol. 37 at 7100. According to the Hearing Officer, beneficial use cannot occur on acres that have been hardened or are otherwise not irrigated. R. Vol. 37 at 7100.

**ii. Selection of the Initial Baseline Year**

26. In evaluating the factors listed above, 2006 satisfies the Hearing Officer's recommendations better than any other single year in the recent record (since 2000).

27. From the standpoint of total annual SWC diversion volumes, 2006 is an appropriate BLY. From 2000-2008, 2006 had total diversions of 97%. If BLY selection is limited to a single

year, 2006 is the best fit in the recent past. However, from the standpoint of annual diversion for individual entities, 2006 was a year of below average diversions for Milner, Minidoka Irrigation District ("MID"), and TFCC, at 82%, 98%, and 96%, respectively (*see* Finding of Fact 29). The selection of a single BLY for all entities is challenging, with all years representing average or near average diversions for some entities, but not others. By selecting a BLY that is comprised of the average of multiple years, a BLY can be selected that best represents the required conditions for each and all entities.

28. With the exception of diversions for Milner, MID, and TFCC, 2006 is an appropriate BLY selection for a single year. The Director finds, however, that it would also be appropriate to use the values of 2006 and 2008 (06/08) to arrive at an average BLY that more strongly fits selection criteria for all members of the SWC.<sup>5</sup> The 06/08 average has below average precipitation, near average ET, above average growing degree days, and were years in which diversions were not limited by availability of water supply. When compared to a period of record spanning from 1990-2008, the 06/08 diversions were above average; or average when considering a period of record from 2000-2008.<sup>6</sup>

29. Comparison of 2006 diversions to the 2000-2008 overall average, below, indicates that, for the SWC entities, with the exception of Milner, the 2006 diversions were within 4% of average. By comparing the average of 2006 and 2008 (06/08) diversions to the 2000-2008 overall average for the SWC entities, the 06/08 diversion are above the historic average, with the exception of Milner, keeping in mind that the average includes the drought years of 2000-2005.

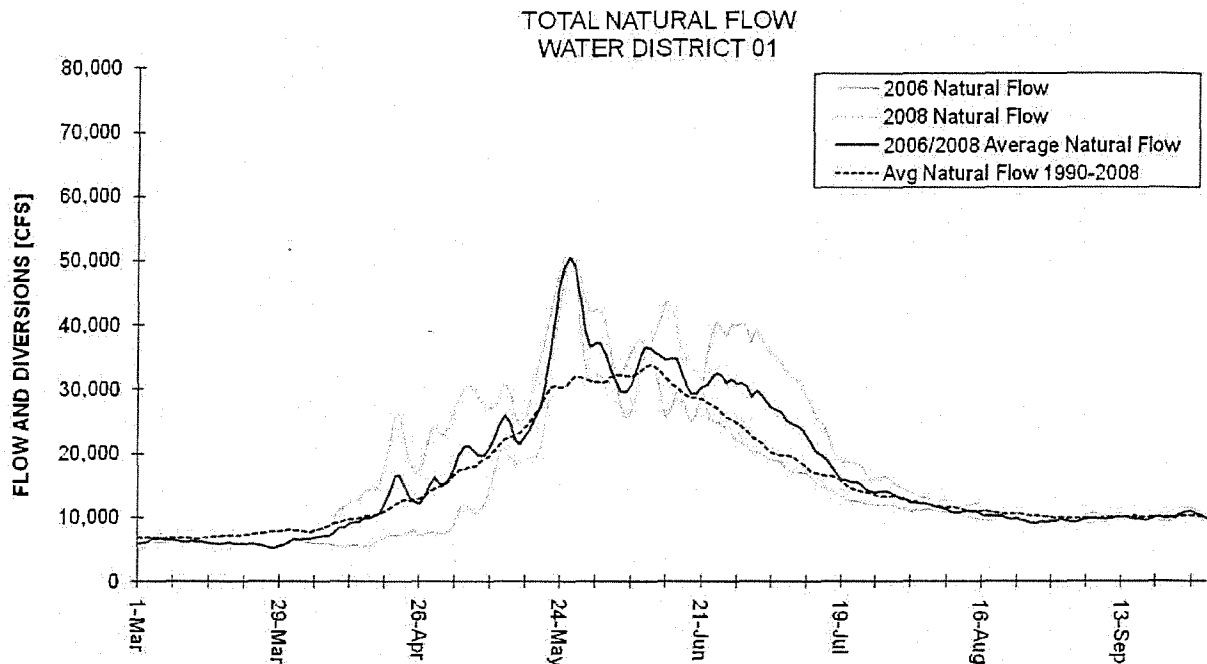
	2000-2008 Avg. Diversions	'06 Total Diversions	'06 % of Avg.	'06/'08 Avg. Total Diversions	'06/'08 % of Avg.
A&B	57,615	57,492	100%	58,492	102%
AFRD2	409,865	410,376	100%	415,730	101%
BID	245,295	247,849	101%	250,977	102%
Milner	50,786	41,671	82%	46,332	91%
Minidoka	358,018	352,269	98%	362,884	101%
NSCC	955,439	963,007	101%	965,536	101%
TFCC	1,031,987	995,822	96%	1,045,382	101%
		Average:	97%		100%

SWC Diversions for 2006; 2006/2008; and 2000 through 2008 Average. Ex. 8000, Vol. IV, Appdx. AS-1-8.

<sup>5</sup> In 2006, TFCC delivered  $\frac{3}{4}$  of a miner's inch. Tr. p. 1601, lns. 1-15.

<sup>6</sup> Former Director Dreher found in the May 2005 Order that "since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record." R. Vol. 8 at 1375. ¶ 78. The drought during this time period was determined by former Director Dreher to have a "probability of recurrence of something in excess of 500 years . . . ." Tr. p. 327, lns. 20-21.

30. Daily natural flow supply for Water District 01 in 2006 and 2008 are depicted below. When averaged together, the 2006 and 2008 natural flow is near the long term average (1990-2008). The long term average is shown as the blue dashed line.



Water District 01 Natural Flow, 2006 and 2008. Ex. 4604.

#### **D. Calculation of Reasonable In-Season Demand**

31. RISD is the projected annual diversion volume for each SWC entity during the year of evaluation that is attributable to the beneficial use of growing crops within the service area of the entity. Given that climate and system operations for the year being evaluated will likely be different from the BLY, the BLY must be adjusted for those differences. As stated by the Hearing Officer, "The concept of a baseline is that it is adjustable as weather conditions or practices change, and that those adjustments will occur in an orderly, understood protocol." R. Vol. 37 at 7098.

##### **i. Assessment of Water Balance Studies Presented at Hearing**

32. Water balance approaches to address the quantity of water needed by members of the SWC were presented in testimony, reports, and exhibits at the hearing. The methodology used for water balance studies provided by the SWC and the GWU experts is summarized in equation form, as set forth in Equation 1, below:

$$(1) \quad Q = \left[ \left( \frac{ET_c \times F_c}{E_a} \right) - W_e \right] \times A_{ID} + S_{loss}$$

Where:

Q = irrigation entity diversion requirement,  
 ET<sub>c</sub> = consumptive use of each crop,  
 F<sub>c</sub> = fraction of area of each crop in irrigation entity,  
 E<sub>a</sub> = field application efficiency,  
 W<sub>e</sub> = estimated effective rainfall during growing season,  
 A<sub>ID</sub> = irrigated area in irrigation entity, and  
 S<sub>loss</sub> = seepage loss from canals.

33. The variables described above were common to both the SWC and GWU water balance analyses, with the following exceptions. The GWU did not account for effective precipitation (W<sub>e</sub>). Ex. 3007 at 17-19. Analysis by the GWU included a reduction in the diversion requirement for supplemental ground water used within SWC service areas. *Id.* at 17. Both of these exceptions will be considered for purposes of determining RISD shortfalls.<sup>7</sup>

34. Another component not shown or considered by the parties is the operation loss, or project return flows. SWC experts recognized the lack of data necessary to estimate this factor: "Operational losses and returns within the delivery system were not included in the irrigation diversion estimate since no consistent measured operational waste records are available." Ex. 8000, Vol. II at 9-7.

35. The areal extent of the SWC is large. Obtaining field measurements of canal seepage losses on the vast network of canals and laterals is not presently feasible given the time and resources necessary to complete such a task. The same would be true for determining the true value of farm or field application efficiency. Measuring farm runoff and deep percolation losses out of the crop root zone at a field level scale is also not practical given the time and resources necessary to complete such a task. Lacking measured data for canal seepage losses, farm runoff, and deep percolation, these parameters must be estimated.

36. The Director must exercise his best professional judgment in quantifying inputs to the water balance study. Differences in judgment affect the numerical results. As stated by the Hearing Officer:

<sup>7</sup> As stated by former Director Dreher, "In making a determination of how much water is needed, I thought it was important to look at all three of those sources [surface water, storage water, and supplemental ground water]." Tr. p. 25, ln. 25; p. 26, lns. 1-2. All acres identified as receiving supplemental ground water within the boundaries of a single SWC entity will initially be evaluated by assigning an entity wide split of the ground water fraction to the surface water fraction as utilized in the development of the ESPA Model. See Ex. 8000, Vol. II, Bibliography at II, referencing *Final ESPA Model, IWRRI Technical Report 06-002 & Design Document DDW-017*. For each entity the ground water fraction to the surface water fraction is as follows: A&B 95:5; AFRD2 30:70; BID 30:70; Milner 50:50; Minidoka 30:70; NSCC 30:70; & TFCC 30:70.

The irony in this case is that surface water and ground water expert testimony used much of the same information and in some respects the same approaches and came up with a difference of 869,000 acre-feet for an average diversion budget analysis of SWC districts for the period from 1990 through 2006. Sullivan Rebuttal Report, November 7, 2007, page 17. The total under the SWC analysis is 3,274,948 acre-feet as compared to the Pocatello analysis of . . . 2,405,861 [acre-feet]. The Director's minimum full supply amount of 3,105,000 falls between the two, though much closer to the SWC analysis.

R. Vol. 37 at 7096.

37. The Hearing Officer also found that the average annual surface irrigation requirements based on 1990 through 2006 for the North Side Canal Company ("NSCC") as calculated by experts for the SWC and GWU differed by 473,217 acre-feet. R. Vol. 37 at 7097. Annual average requirements based on the 1990 through 2006 period for TFCC vary by 310,000 acre-feet. *Id.* These discrepancies do not indicate errors in formulations or calculations, but do demonstrate the range of values in the total irrigation demand that are possible if contributing components to that total demand are calculated using different methods, or with different estimates of unknown parameters.

38. A further example of the range of possible values for seepage loss is shown by comparison of the SWC and GWU expert reports. In the SWC's Exhibit 8201, Pocatello's expert analysis of average annual canal seepage loss is presented as 338,984 acre-feet for NSCC. In the same exhibit, the SWC's expert analysis of average annual seepage loss for NSCC is reported as 586,136 acre-feet.

39. In a 1979 study published by the Idaho Water Resource Research Institute, R.G. Allen and C.E. Brockway determined that conveyance losses for the 1977 diversion volume of 794,930 acre-feet for NSCC was 286,012 acre-feet for 755 miles of canals. Ex. 3060 at 193. Brockway and B.A. Claiborne estimated conveyance losses to be 326,418 acre-feet for the same NSCC system, based on the 1974 diversion volume of 1,117,240 acre-feet. Ex. 3059 at 26.

40. The above seepage loss estimates were all calculated using the Worstall procedure, Ex. 3037 at 38, but range in magnitude by a factor of 1.8 for the two estimates with the highest, but similar, average diversion volumes. Clearly, the magnitudes of the conveyance losses are very sensitive to input parameters selected for use in that procedure.

## **ii. Project Efficiency**

41. Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project. Project efficiency is a term used to describe the ratio of total volumetric crop water need within a project's boundary and the total volume of water diverted by that project to meet crop needs. It is the same concept as system efficiency, which was presented at hearing. Ex. 3007 at 28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). By utilizing

project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components can be captured and described without quantifying each of the components.

42. Project efficiency is calculated as set forth in Equation 2, below:

$$(2) \quad E_p = \frac{CWN}{Q_D}$$

Where:

$E_p$  = project efficiency,

CWN = crop water need, and

$Q_D$  = irrigation entity diversion of water specifically put to beneficial use for the growing of crops within the irrigation entity.

43. Monthly irrigation entity diversions ( $Q_D$ ) will be obtained from Water District 01's diversion records. Ex. 8000, Vol. II, at 8-4, 8-5. Raw monthly diversion values will then be adjusted to remove any water diversions that can be identified to not directly support the beneficial use of crop development within the irrigation entity. Examples of adjustments include the removal of diversions associated with in-season recharge and diversion of irrigation water on the behalf of another irrigation entity.

44. Project efficiencies will be computed for the entire irrigation season. Project efficiency varies from month-to-month during the season, and will typically be lower during the beginning and ending of the season. Project efficiencies will be calculated on a monthly basis for use in adjusting RISD during the year of evaluation. The tables below present average project efficiencies for each SWC member (2001-2007; 2001-2008), with project efficiencies during that time span greater or less than two standard deviations excluded from the calculation. By including only those values within two standard deviations, extreme values from the data set are removed.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	AVG.
4	0.93	0.19	0.27	1.12	0.17	0.14	0.19	0.43
5	0.42	0.27	0.30	0.62	0.26	0.28	0.32	0.35
6	0.63	0.42	0.47	0.61	0.49	0.44	0.52	0.51
7	0.80	0.44	0.56	0.66	0.65	0.50	0.56	0.60
8	0.69	0.38	0.43	0.55	0.48	0.38	0.41	0.47
9	0.52	0.26	0.32	0.49	0.35	0.30	0.24	0.35
10	0.15	0.46	0.11	0.44	0.11	0.24	0.12	0.23
	0.59	0.35	0.35	0.64	0.36	0.33	0.34	0.42

SWC Member Average Monthly Project Efficiencies from 2001-2007.

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	AVG.
4	0.87	0.18	0.26	1.09	0.16	0.14	0.21	0.42
5	0.41	0.25	0.30	0.55	0.27	0.27	0.31	0.34
6	0.64	0.40	0.48	0.61	0.50	0.43	0.50	0.51
7	0.77	0.44	0.56	0.61	0.64	0.48	0.55	0.58
8	0.65	0.38	0.42	0.54	0.48	0.39	0.41	0.46
9	0.51	0.25	0.31	0.44	0.33	0.29	0.24	0.34
10	0.17	0.37	0.11	0.31	0.10	0.20	0.10	0.19
Season Avg.	0.57	0.32	0.35	0.59	0.35	0.31	0.33	0.41

SWC Member Average Monthly Project Efficiencies from 2001-2008.

### iii. Crop Water Need

45. Crop water need ("CWN") is the project wide volume of irrigation water required for crop growth, such that crop development is not limited by water availability, for all crops supplied with surface water by the surface water provider. Crop water need is the difference between the fully realizable consumptive use associated with crop development, or ET, and effective precipitation ( $W_e$ ) and is synonymous with the terms irrigation water requirement and precipitation deficit. Ex. 3024. For the purposes of the methodology, CWN is calculated as set forth in Equation 3, below:

$$(3) \quad CWN = \sum_{i=1}^n (ET_i - W_e) A_i$$

Where,

CWN = crop water need

$ET_i$  = consumptive use of specific crop type,

$W_e$  = estimated effective rainfall,

$A_i$  = total irrigated area of specific crop type,

$i$  = index variable representing the different specific crop types grown within the irrigation entity, and

$n$  = upper bound of summation equal to the total number of different specific crop types grown within the irrigation entity.

### iv. Evapotranspiration

46. ET has been estimated by experts for the parties using theoretically based equations that calculate ET for an individual crop, thus necessitating crop distribution maps for each year. Ex. 3007A at 21, Figure 3, Tables 6-12; Ex. 3024 at 1-58; Ex. 8000, Vol. II at Chapter 9; Ex. 8000, Vol. IV, Appdx. AU.

47. At hearing, values of ET were estimated by the SWC from AgriMet, Ex. 8000, Vol. IV, Appdx. AU-1, and by the GWU from ETIdaho, Ex. 3007A at 21; Ex. 3024 at 1-58. At this time, the Director finds that the use of AgriMet is more appropriate for determining ET than ETIdaho. At this time, AgriMet, is available to all parties in real-time without the need for



advanced programming. Accordingly, the methodology will rely on AgriMet derived ET values in the calculations of project efficiency, crop water need, and RISD. In the future, with the development of additional enhancements, ETIdaho may become a more appropriate analytical tool for determining ET.

48. The utilization of AgriMet derived crop specific ET values necessitates crop distribution profiles similar to those described and presented at hearing. R. Vol. 2 at 420-26; Ex. 3007 at 21 & Table 4; and Ex. 3026. The methodology will utilize crop distributions based on distributions from the United States Department of Agriculture's National Agricultural Statistics Service ("NASS"). Ex. 1005 at 1.<sup>8</sup> NASS reports annual acres of planted and harvested crops by county. NASS also categorizes harvested crops by irrigation practice, i.e. irrigated, non irrigated, non irrigated following summer fallow, etc. Crop distribution acreage will be obtained from NASS by averaging the "harvested" area for "irrigated" crops from 1990-2008. Years in which harvested values were not reported will not be included in the average. It is the Department's preference to rely on data from the current season if and when it becomes usable.

49. AgriMet crop water use (i.e. ET) and weather data are available from the Rupert and Twin Falls (Kimberly) stations for use with the closest SWC entity. Using AgriMet data from Rupert for A&B, Burley Irrigation District ("BID"), Milner, and MID provides a reasonable representation of the climate conditions for those entities and are consistent with common standards of practice. Using AgriMet data from Twin Falls (Kimberly) for American Falls Reservoir District No. 2 ("AFRD2"), NSCC, and TFCC provides a reasonable representation of the climate conditions for those entities and is consistent with common standards of practice. Ex. 8000, Vol. IV at AU-2, AU-8.

#### **v. Effective Precipitation**

50. Effective precipitation ( $W_e$ ), or the water in the soil horizon available for crop root uptake, will be estimated from total precipitation ( $W$ ) utilizing the methodology presented in the USDA Technical Bulletin 1275. Ex. 8000, Vol. IV, Appdx. AU3, AU8. Total precipitation ( $W$ ) is provided by the USBR as part of its Pacific Northwest Cooperative Agricultural Network, i.e. AgriMet. Ex. 8000, Vol. IV, Appdx. AU3.  $W_e$  derived from AgriMet based precipitation values are independent of crop type.

51. AgriMet precipitation ( $W$ ) values are easy to understand and regularly used by the farming, water supply, and water management communities. Accordingly, the methodology will rely on AgriMet derived  $W$  values in the calculations of crop water need and RISD.

52. As with ET data, AgriMet precipitation data are available from the Rupert and Twin Falls (Kimberly) stations for use with the closest SWC entity. Using AgriMet data from Rupert for A&B, BID, Milner, and MID provides a reasonable representation of the climate conditions for those entities and are consistent with common standards of practice. Using AgriMet data from Twin Falls (Kimberly) for AFRD2, NSCC, and TFCC provides a reasonable representation of the

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<sup>8</sup> The ESPA Modeling Committee uses NASS data in the ESPA Model to distribute crop types within the model. See Ex. 8000, Vol. 2, Bibliography at II, referencing *Final ESPA Model, IWRRI Technical Report 06-002*.

climate conditions for those entities and is consistent with common standards of practice. Ex. 8000, Vol. IV at AU-2, AU-8.

vi. **Summary of Reasonable In-Season Demand Calculation**

53. At the start of the irrigation season, RISD is equal to the baseline demand, or total season adjusted diversions for the baseline year(s). When calculated in-season, RISD is calculated by Equation 4, below.

$$(4) \quad RISD_{milestonex\_x} = \sum_{j=1}^m \left( \frac{CWN_j}{E_{p,j}} \right) + \sum_{j=m+1}^7 BD_j$$

Where:

$RISD_{milestonex\_x}$  = reasonable in season demand at specified evaluation milestones during the irrigation season,

CWN = crop water need for month j,

$E_p$  = baseline project efficiency for month j,

BD = baseline demand for month j,

j = index variable, and

m = upper bound of summation, equal to the month calculation occurs, where April = 1, May = 2, ... October = 7.

54. Water is sometimes diverted into canals and onto crops fields in support of crop development for reasons other than strictly meeting the consumptive requirement of the crop; such as canal wetting, salt leaching, soil wetting, and soil temperature control. April and October represent months during the irrigation season when the method of calculating RISD strictly as a function of CWN and PE is less reliable, because CWN is often not the driving factor in diversions during these bookend months. To account for uncertainty of RISD calculations during those time periods, April and October RISD adjustments have been developed.

55. April RISD Adjustment: In April, calculated RISD, as a function of CWN and PE, can grossly under estimate actual diversion needs. Therefore, for each individual surface water provider, if the calculation of  $CWN/E_p$  for the month of April is less than the April average diversion volume over a record of representative years in the recent past, then RISD will be equal to the April average diversion volume. If the calculation of  $CWN/E_p$  is greater than the April average, then RISD will equal the calculated  $CWN/E_p$  volume.

56. October RISD Adjustment: In October, calculated RISD, as a function of CWN and PE, can either grossly under or over estimate actual diversion needs. For each individual surface water provider, if the calculation of  $CWN/E_p$  for the month of October is greater than the October maximum diversion volume, or less than the October minimum diversion volume, over a record of representative years in the recent past, then RISD will be equal to the October average diversion volume, over the same period of representative years. If the calculation of  $CWN/E_p$  is less than the October maximum diversion volume, or greater than the October minimum diversion volume, then RISD will equal the calculated  $CWN/E_p$  volume.

#### **D. Adjustment of Forecast Supply**

57. As stated by the Hearing Officer, "There must be adjustments as conditions develop if any baseline supply concept is to be used." R. Vol. 37 at 7093.

##### **i. April 1**

58. Typically within the first week of April, the USBR and the USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage from April 1 to July 31 for the forthcoming year. Given current forecasting techniques, the earliest the Director can predict material injury to RISD "with reasonable certainty" is soon after the Joint Forecast is issued. R. Vol. 2 at 226. With data from 1990 through the previous water year, a regression equation will be developed for each SWC member by comparing the actual Heise natural flow to the natural flow diverted. *See e.g.* R. Vol. 8 at 1416-22. The regression equation will be used to predict the natural flow diverted for the upcoming irrigation season. *Id.* at 1380. The actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply. *Id.*; Tr. p. 65, lns. 6-25; p. 66, lns. 1-2.

59. The storage allocation for each member of the SWC will be estimated by the Department following the Joint Forecast. The reservoir fill and allocation will be predicted by using data from a similar year. The Forecast Supply is the sum of the estimated storage allocation and the predicted natural flow diversion. This volume will be used in the shortfall calculations until better data is available later in the irrigation season.

##### **ii. Early to Mid-July**

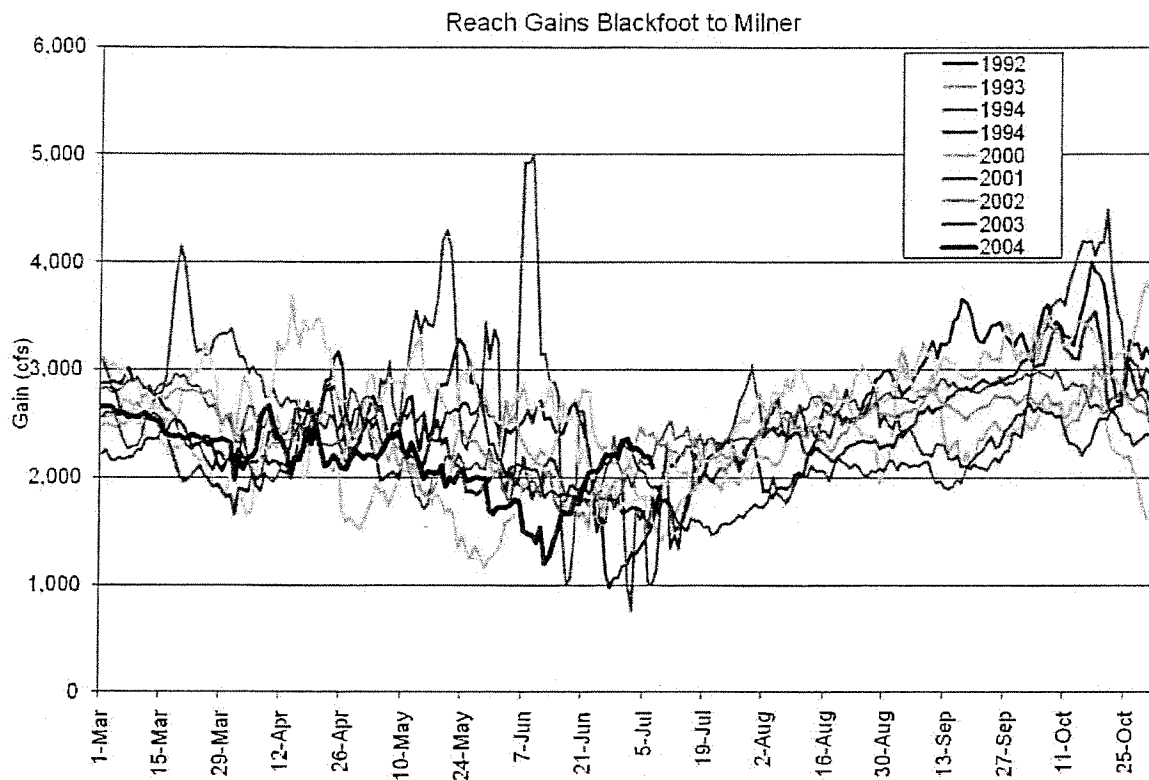
60. In early to mid-July, the Forecast Supply will be adjusted. The reservoirs will typically have filled to their peak capacity for the season and the storage water will have been allocated. The Department's water rights accounting model will be used to compute the natural flow diverted by each member of the SWC as of the new forecast date. The natural flow diversion for the remainder of the irrigation season will be estimated based on a historical year with similar gains in the Blackfoot to Milner reach. Reach gains are graphed below, using 2004 as an example. In this case, 2003 has similar reach gains and is appropriately conservative. Therefore, the natural flow diverted in 2003 would be used to predict the natural flow diversions for the remainder of the 2004 season. The adjusted Forecast Supply is the sum of the actual natural flow diversions, the predicted natural flow diversions, and the storage allocation.

##### **iii. Time of Need**

61. The July procedure will be repeated shortly before the Time of Need<sup>9</sup> with the updated water rights accounting data.

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<sup>9</sup> The calendar day determined to be the Time of Need is established by predicting the day in which the remaining storage allocation will be equal to reasonable carryover, or the difference between the 06/08 average demand and the 02/04 supply.



Example reach gain analysis for 2004.

#### E. Calculation of Demand Shortfall

62. Equation 5, below, is used to determine the amount of predicted demand shortfall during the irrigation season.

$$(5) \quad DS = RISD - FS$$

Where:

DS = demand shortfall for specified evaluation points throughout the season,  
 RISD = Reasonable in-season demand from Equation 4, and  
 FS = forecasted supply for remainder of season after specified evaluation point during the season.

63. The amount calculated represents the volume that junior ground water users will be required to have available for delivery to members of the SWC found to be materially injured by the Director. The amounts will be calculated in April and in the middle of the season.

### III. Methodology For Determining Material Injury To Reasonable Carryover

64. CM Rule 42.01.g provides the following guidance for determining reasonable carryover: "In determining a reasonable amount of carry-over storage water, the Director shall consider average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

#### A. Projected Water Supply

65. CM Rule 42.01.g provides that the Director "shall consider . . . the projected water supply for the system." Carryover shortfall will be determined following the completion of the irrigation season. Because it is not possible to adequately forecast the irrigation demand for the following irrigation season at the end of the current irrigation season, the Director must make a projection of need. R. Vol. 37 at 7109 ("Anticipating the next season of need is closer to faith than science."). The average of 2006/2008 BLY will be the projected demand.

66. Similar to projecting demand, the Director must also project supply. The Heise natural flows, for the years 2002 and 2004, were well below the long term average (1971-2000) but were not the lowest years on record. Ex 8000, Vol. II at 6-37:6-28; R. Vol. 8 at 1379-80. The average of the 2002 and 2004 supply will be the projected supply, representing a typical dry year. The 2002 and 2004 supply is computed as follows:

- 2002 supply = natural flow diverted + new fill
- 2004 supply = natural flow diverted + new fill
- Projected supply = average of 2002 supply and 2004 supply

Carryover from the previous years is not included in the 2002 and 2004 supply calculation because it was not new water supplied during the 2002 or 2004 irrigation year.

67. As described above, reasonable carryover based on projected water supply (2002/2004) and projected demand (2006 BLY; 2006/2008 BLY) are as follows:

	Reasonable Carryover 2006 BLY (Acre-Feet)	Reasonable Carryover 2006/2008 BLY (Acre-Feet)
A&B	16,000	17,000
AFRD2	50,700	56,000
BID	0	0
Milner	100	4,800
Minidoka	0	0
NSCC	54,700	57,200
TFCC	0	29,700

Reasonable Carryover by Entity (2002/2004 supply; 2006 BLY; 2006/2008 BLY).

## B. Average Annual Rate of Fill

68. CM Rule 42.01.g states that the Director “shall consider the average annual rate of fill of storage reservoirs . . . .” The average annual reservoir fill serves as a means to evaluate reasonable carryover, calculated as the difference between the projected demand and the projected supply. For purposes of the table below, any water contributed to the rental pool from the previous year was added to the next year’s fill volume so that it does not artificially lower the percent fill. R. Vol. 37 at 7108. Water that is supplied to the rental pool lowers carryover and could impact the following year’s fill. The percent fill does not include water deducted for reservoir evaporation. The annual percent fill of storage volume by SWC entity is shown below:

	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
Average	82%	99%	98%	90%	96%	95%	95%
Std Dev	27%	5%	5%	16%	7%	6%	10%

Annual Percent Fill of Storage Volume by Entity (1995-2007).<sup>10</sup>

<sup>10</sup> See e.g. Ex. 4125. Exhibit 4125 accounts for water deducted for evaporation, but does not take into account water supplied to the rental pool.

	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
1995	100%	100%	100%	100%	100%	100%	100%
1996	100%	100%	100%	100%	100%	100%	100%
1997	100%	100%	100%	100%	100%	100%	100%
1998	100%	100%	100%	100%	100%	100%	100%
1999	100%	100%	100%	96%	100%	98%	99%
2000	100%	99%	99%	98%	100%	97%	97%
2001	100%	100%	100%	100%	100%	91%	87%
2002	41%	100%	100%	90%	92%	84%	88%
2003	43%	100%	99%	66%	92%	94%	99%
2004	34%	82%	98%	48%	95%	82%	63%
2005	58%	100%	100%	77%	98%	100%	100%
2006	98%	100%	99%	98%	100%	99%	99%
2007	89%	100%	83%	92%	77%	95%	97%
2008	100%	100%	85%	100%	80%	99%	100%
Average	83%	99%	97%	90%	95%	96%	95%
Std Dev	26%	5%	6%	16%	8%	6%	10%

Annual Percent Fill of Storage Volume by Entity (1995-2008).

### C. Average Annual Carryover

69. CM Rule 42.01.g states that the Director “shall consider the . . . average annual carry-over for prior comparable water conditions . . . .” This factor will be taken into consideration when determining reasonable carryover. Actual carryover volumes were adjusted from values reported in the storage reports so that they did not include water received for mitigation purposes or water rental by the canal company for use within the irrigation district. R. Vol. 37 at 7108. Actual carryover from 1995 through 2008 was sorted into categories ranging from very dry to wet. The categories are based on the Heise natural flow volumes from April through September.

Heise April – Sept Natural Flow		Year	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Very Dry <3000 KAF	2001	9,902	4,217	37,430	26,854	55,132	42,421	26,917	
	2007	62,739	7,962	34,639	36,520	61,744	68,947	(21,811)	
	2002	30,192	8,570	72,835	14,531	99,488	133,702	32,635	
	2004	(3,771)	18,537	47,845	8,735	97,905	19,145	21,551	
	2003	9,401	3,649	51,686	6,906	81,673	166,217	(18,169)	
	Average	21,693	8,587	48,887	18,709	79,188	86,086	8,225	
Dry 3000 – 4000 KAF	2000	66,915	20,787	107,425	43,173	160,183	205,510	52,536	
	2005	36,665	99,097	90,190	37,593	150,623	365,001	64,452	
	Average	51,790	59,942	98,808	40,383	155,403	285,256	58,494	

Average	2006	89,311	107,682	102,873	58,755	182,612	365,672	51,187
4000-4500 KAF	1995	82,567	167,451	134,340	75,451	237,300	441,729	58,675
	<b>Average</b>	<b>85,939</b>	<b>137,566</b>	<b>118,607</b>	<b>67,103</b>	<b>209,956</b>	<b>403,701</b>	<b>54,931</b>
Wet	1998	87,250	144,057	109,014	67,777	193,810	494,664	156,433
>4500 KAF	1999	78,312	121,793	168,545	67,147	205,716	454,338	191,501
	1996	85,209	145,019	127,123	70,250	228,786	472,790	111,459
	1997	89,811	114,324	87,073	65,307	202,475	464,715	136,926
	<b>Average</b>	<b>85,145</b>	<b>131,299</b>	<b>122,939</b>	<b>67,620</b>	<b>207,697</b>	<b>471,627</b>	<b>149,080</b>

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2007).

Heise April – Sept Natural Flow	Year	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Very Dry	2001	9,902	4,217	37,430	26,854	55,132	42,421	26,917
<3000 KAF	2007	62,739	7,962	34,639	36,520	61,744	68,947	(21,811)
	2002	30,192	8,570	72,835	14,531	99,488	133,702	32,635
	2004	(3,771)	18,537	47,845	8,735	97,905	19,145	21,551
	2003	9,401	3,649	51,686	6,906	81,673	166,217	(18,169)
	<b>Average</b>	<b>21,693</b>	<b>8,587</b>	<b>48,887</b>	<b>18,709</b>	<b>79,188</b>	<b>86,086</b>	<b>8,225</b>
Dry	2000	66,915	20,787	107,425	43,173	160,183	205,510	52,536
3000 – 4000 KAF	2005	36,665	99,097	90,190	37,593	150,623	365,001	64,452
	<b>Average</b>	<b>51,790</b>	<b>59,942</b>	<b>98,808</b>	<b>40,383</b>	<b>155,403</b>	<b>285,256</b>	<b>58,494</b>
Average	2006	89,311	107,682	102,873	58,755	182,612	365,672	51,187
4000 – 4500 KAF	2008	92,193	102,753	130,762	63,342	182,531	413,408	65,648
	1995	82,567	167,451	134,340	75,451	237,300	441,729	58,675
	<b>Average</b>	<b>88,024</b>	<b>125,962</b>	<b>122,659</b>	<b>65,849</b>	<b>200,814</b>	<b>406,936</b>	<b>58,504</b>
Wet	1998	87,250	144,057	109,014	67,777	193,810	494,664	156,433
>4500 KAF	1999	78,312	121,793	168,545	67,147	205,716	454,338	191,501
	1996	85,209	145,019	127,123	70,250	228,786	472,790	111,459
	1997	89,811	114,324	87,073	65,307	202,475	464,715	136,926
	<b>Average</b>	<b>85,145</b>	<b>131,299</b>	<b>122,939</b>	<b>67,620</b>	<b>207,697</b>	<b>471,627</b>	<b>149,080</b>

Actual Carryover Volumes by Entity, Sorted by Heise Natural Flow (1995-2008).

70. In considering the principles articulated in CM Rule 42.01.g, the Director will project reasonable carryover shortfalls for members of the SWC. The following table represents the 2006 and the 2006/2008 BLY diversion volumes and total reservoir storage space by entity. By dividing the total reservoir space by the 2006 or 2006/2008 diversion volume, a metric is established that describes the total number of seasons the entity's reservoir space can supply water.



	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC
06 BLY	57,492	410,376	247,849	41,671	352,269	963,007	995,822
06/08 BLY	58,492	415,730	250,977	46,332	362,884	965,536	1,045,382
Total Reservoir Space	137,626	393,550	226,487	90,591	366,554	859,898	245,930

Total Reservoir Space<sup>11</sup> in Comparison to Demand.

#### **D. Reasonable Carryover Shortfall**

##### **i. A&B**

71. A&B's reservoir space has the lowest average annual rate of fill with the highest variability in fill. *See Finding of Fact 68.* In very dry years, the potential exists that A&B's actual carryover will be less than the reasonable carryover. *See Finding of Fact 69.* A&B has an approximate two-year water supply provided by its total available storage space. *See Finding of Fact 70.* Because of its lower rate of fill, it is likely A&B will experience carryover shortfalls in consecutive dry years. Because of these factors, the estimated reasonable carryover for A&B (17,000 AF) is appropriate. *See Finding of Fact 67.*

##### **ii. AFRD2**

72. AFRD2 has the highest and most consistent reservoir rate of fill of any member of the SWC. *See Finding of Fact 68.* Therefore, any unfilled space in the fall will most likely fill. AFRD2 has, however, an approximate one-year supply available in storage. *See Finding of Fact 70.* In a very dry year, AFRD2's historical carryover volume is often less than the amount needed for reasonable carryover. Because of these factors, the estimated reasonable carryover for AFRD2 (56,000 AF) is appropriate. *See Finding of Fact 67.*

##### **iii. BID & Minidoka**

73. In an average demand year, BID and Minidoka will have enough water to meet demands given a low water supply. *See Finding of Fact 67. See also R. Vol. 37 at 7105.* Historically, even in very dry years, BID's and Minidoka's carryover have been well above the calculated reasonable carryover and it is unlikely that they will have reasonable carryover shortfalls in the future. *See Finding of Fact 69. See also R. Vol. 37 at 7105.* Because of these factors, the estimated reasonable carryover for BID and Minidoka is 0 AF. *See Finding of Fact 67. See also R. Vol. 37 at 7105.*

##### **iv. Milner**

74. Similar to A&B, Milner's reservoir space had the second lowest average annual rate of fill of all entities with a high degree of variability in fill. *See Finding of Fact 68.* In very dry years, the potential exists that Milner's actual carryover will be less than the reasonable carryover.

<sup>11</sup> *See R. Vol. 8 at 1373-74.*

See Finding of Fact 69. Milner has an approximate two-year water supply available in storage. See Finding of Fact 70. Because of its rate of fill, it is likely Milner will experience carryover shortfalls in consecutive dry years. Because of these factors, the estimated reasonable carryover for Milner (4,800 AF) is appropriate. See Finding of Fact 67.

v. NSCC

75. NSCC has a near average annual rate of fill in comparison to all entities and an approximate one-year water supply available in storage. See Findings of Fact 68 and 70. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. See Finding of Fact 69. Because of these factors, the estimated reasonable carryover for NSCC (57,200 AF) is appropriate. See Finding of Fact 67.

vi. TFCC

76. TFCC has a near average annual rate of fill in comparison to all entities, but only a one-quarter of a year's water supply available in storage. See Findings of Fact 68 and 70. In dry years, the potential exists that its reasonable carryover will be less than its actual carryover. See Finding of Fact 69. In the 2006 irrigation season, supplies were average, but TFCC's demands were below average. See Findings of Fact 22 and 29. Therefore, if 2006 is used as the BLY, it will predict zero reasonable carryover for TFCC. See Finding of Fact 67. The 2006/2008 BLY average reasonably predicts TFCC's reasonable carryover needs.<sup>12</sup> Because of these factors, the estimated reasonable carryover for TFCC (29,700 AF) is appropriate. See Finding of Fact 67.

## CONCLUSIONS OF LAW

1. In his September 5, 2008 Final Order, the Director stated his intention to issue a separate, final order "detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover . . ." R. Vol. 39 at 7386. On July 24, 2009, the Honorable John M. Melanson issued his *Order on Petition for Judicial Review*, in which he found that the Director's decision to bifurcate the proceedings conflicted with the Idaho Administrative Procedures Act; the court therefore remanded the issue to the Department.

2. Parties to the judicial review proceedings filed petitions for reconsideration with the court for a myriad of issues. Responding to the petition for reconsideration filed by IGWA regarding the issue of bifurcation, the Department stated that "sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand." *IDWR Response Brief on Rehearing* at 3 (November 6, 2009). At oral argument on rehearing, the Department requested that the court "hold in abeyance its decision on rehearing until the Director issues the new order and the time for filing a motion for reconsideration and a petition for judicial review of the order has expired." *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 2 (March 4, 2010). The court therefore ordered the Department to issue a final order determining material injury to reasonable in-season demand and reasonable

<sup>12</sup> Although not as severe, the 2006 BLY also underestimates Milner's reasonable carryover needs. Similarly to TFCC, 2006/2008 reasonably estimates Milner's reasonable carryover.

carryover by March 31, 2010. "Pursuant to I.A.R. 13(b)(14), the Court shall hold in abeyance any final decision on rehearing until such an order is issued . . . ." *Id.* at 3. On March 29, 2010, the court extended the deadline for the Director's order to April 7, 2010. *Order Granting Unopposed Motion for Extension of Time to File Order on Remand.*

3. The purpose of this order is to provide the methodology by which the Director will determine material injury to RISD and reasonable carryover to members of the SWC.

4. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251(5); IDAPA 37.01.01.600.

5. Idaho Code § 42-602 states that, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . . The director of the department of water resources shall distribute water . . . in accordance with the prior appropriation doctrine." According to the Hearing Officer, "It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature [in Idaho Code § 42-602] did not intend to sum up water law in a single sentence of the Director's authority." R. Vol. 37 at 7085. The Idaho Supreme Court has recently stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). The CM Rules incorporate all principles of the prior appropriation doctrine as established by Idaho law. CM Rule 20.03.

6. "Priority of appropriation shall give the better right as between those using the water" of the State. Idaho Const. Art. XV, § 3. "As between appropriators, the first in time is first in right." Idaho Code § 42-106. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915).

7. It is the policy of this State to integrate the appropriation, use, and administration of ground water with the use of surface water in such a way as to optimize the beneficial use of water: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources." Idaho Code § 42-226. *See also* Idaho Const. Art. XV, § 7; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

8. In *American Falls*, the Court stated as follows:

The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by

which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

*American Falls* at 877-878, 154 P.3d at 448-449.

9. In the context of conjunctive administration, the Director's methodology for projecting material injury does not impose an obligation upon members of the SWC to reprove their water rights. To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much water is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. *American Falls* at 880, 154 P.3d at 451; *Order on Petition for Judicial Review* at 24-25; R. Vol. 37 at 7098 ("Properly applied the minimum full supply approach is an attempt to measure, for purposes of determining if there should be curtailment, the amount of water senior surface water users need to raise crops of their choosing to maturity with the number of cuttings weather conditions will allow.").

10. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness, optimum development of water resources in the public interest, and full economic development. Idaho Const. Art XV, § 7; Idaho Code § 42-226; CM Rule 20 and 42; *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912); *American Falls* at 876-77, 154 P.3d at 447-48.

11. Here, the Director has established a methodology for determining material injury to members of the SWC. The methodology predicts material injury to RISD by taking the difference between RISD and the forecasted supply. At this time, with the recognition that the methodology is subject to adjustment and refinement, RISD will be equal to the historic demands associated with the BLY (2006/2008), and will be corrected during the season to account for variations in climate and water supply between the BLY and actual conditions.

12. The years 2000 through 2008 were used to select the initial BLY because it captured current irrigation practices in a dry climate. Based upon his evaluation of the record, members of the SWC were exercising more reasonable efficiencies during this time period than during the 1990s when supplies were more plentiful and the climate more forgiving. During periods of drought when junior ground water users are subject to curtailment, members of the SWC should exercise reasonable efficiencies in order to promote the optimum utilization of the State's water resources. Idaho Const. Art. XV, § 7; Idaho Code § 42-226; CM Rules 20 and 42.

13. Recognizing that climate and surface water supplies (natural flow and storage) are inherently variable, the Director's predictions of material injury to RISD and reasonable carryover are based upon the best available information and the best available science, in conjunction with the Director's professional judgment as the manager of the State's water resources. Recognizing his ongoing duty to administer the State's water resources, the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology. As the process of predicting and evaluating material injury moves forward, and more data is developed, the methodology will be subject to adjustment and refinement.

14. If the Director predicts that the SWC will be materially injured, the consequence of that prediction is an obligation that must be borne by junior ground water users. If mitigation water in the amount of the projected RISD shortfall cannot be optioned by junior ground water users to the satisfaction of the Director (*see Order on Petition for Judicial Review* at 19), the Director will curtail junior ground water users to make up any deficit. By requiring that junior ground water users have options for water in place during the season of need, the Director ensures that the SWC does not carry the risk of shortage to their supply. By not requiring junior ground water users to provide mitigation water until the time of need, the Director ensures that junior ground water users provide only the required amount of water.

15. Unless there is reasonable certainty that junior ground water users can secure the predicted volume of water and provide that water at the time of need, the purpose of allowing junior ground water users to continue to divert by providing water for mitigation is defeated. The risk of shortage is then impermissibly shouldered by the SWC. Members of the SWC should have certainty entering the irrigation season that mitigation water will be provided at the time of need, or curtailment of junior ground water rights will be ordered at the start of the irrigation season.

16. Because climate and the supply that the SWC appropriated (natural flow and storage) are inherently variable, the Director cannot and should not insulate the SWC against all shortages. The Director can, however, protect the SWC against reasonably predicted shortages to RISD.

17. Currently, the USBR and USACE's Joint Forecast is the best predictive tool at the Director's disposal for predicting material injury to RISD. Given current forecasting techniques, the earliest the Director can predict material injury to RISD with reasonable certainty is soon after the Joint Forecast is issued in early April. By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. The Director further guards against RISD shortage by using the 2006/2008 BLY, which has above average ET, below average in-season precipitation, and above average growing degree days. The 2006/2008 average represents years in which water supply did not limit diversions. The Director's prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Const. Art. XV, § 3; Idaho Code § 42-106.

18. Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need (defined in footnote 9, *supra*). If it is

determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based upon the Director's discretion and his balancing of the principle of priority of right with the principles of optimum utilization and full economic development of the State's water resources. Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226. Because the methodology is based upon conservative assumptions and is subject to refinement, the possibility of under-predicting material injury is minimized and should lessen as time progresses. The methodology should provide both the SWC and junior ground water users certainty at the start of the irrigation season.

19. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

20. According to CM Rule 42.01.g, members of the SWC are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in "future dry years." Guidance for determining reasonable carryover is also found in CM Rule 42.01.g: "In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system."

21. While the right to reasonable carryover is provided by CM Rule 42.01.g, the Court in *American Falls* established that there are limitations upon that right:

At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out.

*American Falls* at 880, 154 P.3d at 451.

22. While CM Rule 42.01.g contemplates reasonable carryover for future dry years, the Hearing Officer determined that "requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost to irrigation use to be acceptable within the standards implied in *AFRD#2*." R. Vol. 37 at 7109-10. Therefore, a

senior may only seek curtailment of juniors to provide reasonable carryover for a period of one year. *Id.* In his 2008 Final Order, former Director Tuthill accepted the recommendation of the Hearing Officer.

23. In its *Order on Petition for Judicial Review*, the court held that it was incorrect for the Director to categorically limit the right to carryover storage “for more than just the next season . . .” *Order on Petition for Judicial Review* at 22. The court went on to say, however, that the Director, “in the exercise of his discretion, can significantly limit or even reject carry-over for multiple years based on the specific facts and circumstances of a particular delivery call. Ultimately, the end result may well be the same.” *Id.*

24. As discussed in the Findings of Fact, reasonable carryover is determined by projecting the water supply for the system. This is accomplished by projecting the 2002/2004 supply and the 2006/2008 demand. Next, the Director examines the average annual rate of fill of the storage rights held by members of the SWC to determine each entities’ relative probability of fill. Finally, the Director examines the average annual carryover for prior comparable water conditions by reviewing Heise natural flow.

25. If, in the fall, the Director finds that a reasonable carryover shortfall exists, the Director will use the ESPA Model to determine the transient impacts of curtailment (year-to-year). The ESPA Model will be used to determine the yearly impacts of curtailment of junior ground water users, if curtailed from April 1 through March 31.<sup>13</sup> It is this volume of water that junior ground water users must have optioned in the fall in order to start the subsequent irrigation season without an order of curtailment.

26. Recognizing that reservoirs space held by members of the SWC may fill, and in order to prevent the waste of water, junior ground water users are not required to provide the volume of reasonable carryover until after the Day of Allocation (defined in footnote 16, *infra*). Junior ground water users are required to provide reasonable carryover to the SWC until reservoir space held by the entities fills. If the reservoir space does not fill, the results of the transient analysis must be optioned by junior ground water users in the fall. In addition, the Director will determine shortfalls to the SWC’s reasonable carryover for the next irrigation season and use the ESPA Model to determine the transient volume of water that must be optioned. This transient obligation is in addition to the subsequent year’s transient obligation. *See* Attachment A.

27. By modeling the impacts of curtailments until the reservoir space held by members of the SWC fills, junior ground water users have an accruing mitigation obligation. In this way, the Director is able to account for reasonable carryover for “future dry years.” CM Rule 42.01.g.

28. The Director recognizes that his analysis of the obligation for reasonable carryover differs from his analysis for RISD obligations. In predicting RISD shortages, the Director is able to premise his determination on the Joint Forecast. The Director requires junior ground water users to

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<sup>13</sup> Version 1.1 of the ESPA Model runs on six-month time steps. Because an irrigation season is nine months long, simulating curtailment for a period of six months would under estimate the impacts of curtailment and unreasonably shift the risk of shortage to the SWC. Because version 1.1 of the ESPA Model cannot simulate curtailment for nine months, it is appropriate to simulate curtailment for one year, as opposed to six months. Because the methodology is subject to refinement, this determination may be revisited if the time steps are changed.

provide the entire RISD shortage because the Joint Forecast allows determination of material injury with reasonable certainty.

29. In the fall of the subsequent irrigation season, the Director cannot, with reasonable certainty, predict material injury to reasonable carryover. As found by the Hearing Officer, "Anticipating the next season of need is closer to faith than science." R. Vol. 37 at 7109. Because of the uncertainty associated with this prediction, and in the interest of balancing priority of right with optimum utilization and full economic development of the State's water resources, Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226, the Director will use the ESPA Model to simulate transient curtailment of the projected reasonable carryover shortage. By requiring that junior ground water users have options in place in the fall of the subsequent irrigation season in the amount of the first year of curtailment (accruing from season-to-season until reservoir space fills), the Director ensures that a certain volume of water will be carried over from one season to the next. This allows the SWC to plan for the coming irrigation season, and places the risk of reasonable shortage on junior ground water users. In light of the unpredictable nature of the determination of material injury to reasonable carryover, the use of the ESPA Model imposes a reasonable burden on junior ground water users.

### ORDER

Based upon and consistent with the Findings of Fact and Conclusions of Law, the Director hereby orders that, for purposes of determining material injury to reasonable in-season demand and reasonable carryover, the following steps will be taken:

1. Step 1: By April 1, members of the SWC will provide electronic shape files to the Department delineating the total irrigated acres within their water delivery boundary or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%; provided that the total acreage count does not exceed the number of acres to be irrigated within the decreed place of use. If this information is not timely provided, the Department will determine the total irrigated acres based upon past year cropping patterns and current satellite and/or aerial imagery. The Department will publish electronic shape files for each member of the SWC for the current water year for review by the parties. In determining the total irrigated acreage, the Department will account for supplemental ground water use.

2. Beneficial use cannot occur on lands that are not described in the SWC's water rights. If, however, the acreage count is under reported by more than five percent of the irrigated acreage limit of the water right, then an assessment must be made of the impact of this reduction in use of the water right on any mitigation requirement.

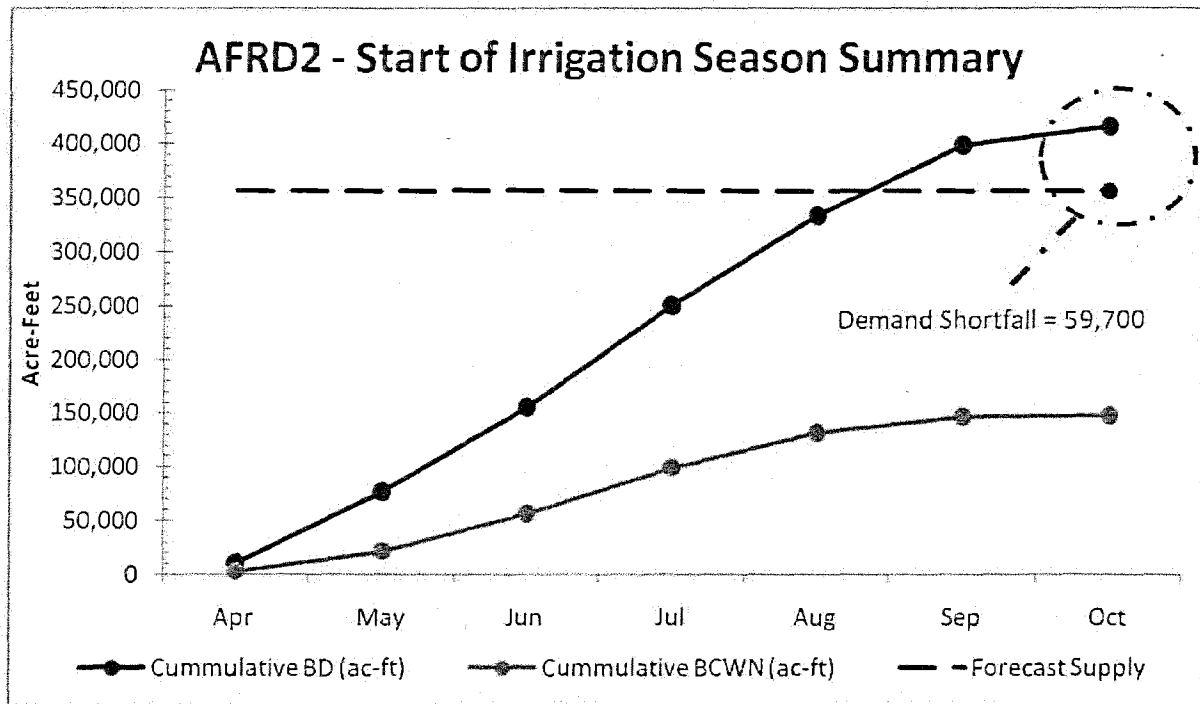
3. Step 2: Starting at the beginning of April, the Department will calculate the cumulative CWN volume for all land irrigated with surface water within the boundaries of each member of the SWC.

- Volumetric values of CWN will be calculated using ET and precipitation values from the USBR's AgriMet program, irrigated areas provided by each entity, and crop distributions based on NASS data.



- Cumulative in-season CWN values will be calculated for each member of the SWC, approximately once a month.

4. Step 3: Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, the Director will predict and issue a Forecast Supply for the water year and will compare the forecast supply to the baseline demand ("BD") to determine if a demand shortfall ("DS") is anticipated for the upcoming irrigation season. A separate Forecast Supply and DS will be determined for each member of the SWC. See below for an example.<sup>14</sup>



AFRD2 Start of Irrigation Season Summary, Initial Demand Shortfall Prediction.

5. Step 4: If the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water equal to the difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users cannot provide this information, by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users.<sup>15</sup>

<sup>14</sup> For the purposes of the illustrative example, AFRD2 was selected as the water user, a dry year was selected as the irrigation season, and 2006/2008 was selected as the BLY. Forecast supply was calculated utilizing historic natural flow and historic reservoir storage data.

<sup>15</sup> This presumes that any reasonable carryover obligation has been met, and that junior ground water users are not already under prior curtailment from deficiencies in meeting the previous year's obligation.

6. Step 5: Within fourteen (14) days following the publication of Water District 01's initial storage report, which typically occurs soon after the Day of Allocation,<sup>16</sup> the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be provided to members of the SWC at the Time of Need.

7. Step 6: Approximately halfway through the irrigation season, but following the events described in Step 5, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; (2) estimate the Time of Need date; and (3) issue a revised Forecast Supply.

8. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, projected demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue RISD and revised DS values.

9. Step 7: Shortly before the Time of Need, but following the events described in Steps 5 and 6, the Director will, for each member of the SWC: (1) evaluate the actual crop water needs up to that point in the irrigation season; and (2) issue a revised Forecast Supply.

10. This information will be used to recalculate RISD and adjust the projected DS for each member of the SWC. RISD will be calculated utilizing the project efficiency, projected demand, and the cumulative actual crop water need determined up to that point in the irrigation season. The Director will then issue RISD and revised DS values.

11. Step 8: At the earliest forecasted Time of Need for any member of the SWC, junior ground water users are required to provide the lesser of the two volumes<sup>17</sup> from Step 4 (May 1 secured water) and Step 7 (RISD volume calculated at the Time of Need). If the calculations from Step 7 indicate that a volume of water necessary to meet in-season projected demand shortfalls is greater than the volume from Step 4, no additional water is required.

12. The Director will review, at the end of the season, the volume and efficiencies of application of surface water, the amount of mitigation water provided by junior ground water users, and may, in the exercise of his professional judgment, readjust the reasonable carryover shortfalls to reflect these considerations.

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<sup>16</sup> The Day of Allocation is the time in the irrigation season when the Water District 01 watermaster is able to issue allocations to storage space holders after the reservoir system has achieved its maximum physical fill, maximum water right accrual, and any excess spill past Milner Dam has ceased. Tr. p. 902, lns. 7-25; p. 903, lns. 1-10.

<sup>17</sup> This refers to the overall volume for the entire estimate. While the overall volume predicted at the start of the season represents with certainty the upper bound of water that junior ground water users will need to provide to members of the SWC, values predicted at the start of the season may adjust up or down at the time of mid-season re-evaluation.

13. Step 9: Following the end of the irrigation season (on or before November 30), the Department will determine the total actual volumetric demand and total actual *crop water need* for the entire irrigation season. This information will be used for the analysis of reasonable carryover shortfall, selection of future baseline years, and for the refinement and continuing improvement of the method for future use.

14. On or before November 30, the Department will publish estimates of actual carryover and reasonable carryover shortfall volumes for all members of SWC. These estimates will be based on but not limited to the consideration of the best available water diversion and storage data from Water District 01, return flow monitoring, comparative years, and RISD. These estimates will establish the obligation of junior ground water users in providing water to the SWC for reasonable carryover shortfall. Fourteen (14) days following the publication by the Department of reasonable carryover short fall obligations, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to provide a volume of storage water equal to the reasonable carryover shortfall for all injured members of the SWC. If junior ground water users cannot provide this information, the Director will issue an order curtailing junior ground water rights.

15. Step 10: As an alternative to providing the full volume of reasonable carryover shortfall established in Step 9, junior ground water users can request that the Department model the transient impacts of the proposed curtailment based on the Department's water rights data base and the ESPA Model. The modeling effort will determine total annual reach gain accruals due to curtailment over the period of the model exercise. *See R. Vol. 8 at 1386-87.* In the year of injury, junior ground water users would then be obligated to provide the accrued volume of water associated with the first year of the model run. *See id. at 1404, ¶ 5.* In each subsequent year, junior ground water users would be required to provide the respective volume of water associated with reach gain accruals for that respective year, until such time as the reservoir storage space held by members of the SWC fills, or the entire volume of water from Step 9 less any previous accrual payments is provided. *See id. at 1404, ¶ 6.*


16. Included as an attachment to this order is an illustrative tabulated example, for each SWC entity, for three consecutive water years, illustrating the accounting that will be applied in determining reasonable carryover shortfalls, in-season demand shortfalls, water optioning, and water delivery requirements.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the issuance of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28)

days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 7<sup>th</sup> day of April, 2010.



GARY SPACKMAN

Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of April, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

Honorable John M. Melanson Idaho Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 <a href="mailto:tarkoosh@capitollawgroup.net">tarkoosh@capitollawgroup.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

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<p>Randall C. Budge  Thomas J. Budge  RACINE OLSON  P.O. Box 1391  Pocatello, ID 83204-1391  <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a>  <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Kathleen Carr  US Dept. Interior  960 Broadway Ste 400  Boise, ID 83706</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>David W. Gehlert  Natural Resources Section  Environment and Natural Resources Division  U.S. Department of Justice  1961 Stout Street, 8<sup>th</sup> Floor  Denver, CO 80294  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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<p>Dean A. Tranmer  City of Pocatello  P.O. Box 4169  Pocatello, ID 83205  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael C. Creamer  Jeffrey C. Fereday  GIVENS PURSLEY LLP  P.O. Box 2720  Boise, ID 83701-2720  <a href="mailto:mcc@givenspursley.com">mcc@givenspursley.com</a>  <a href="mailto:jcf@givenspursley.com">jcf@givenspursley.com</a></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Deborah Gibson  
Administrative Assistant to the Director

# ATTACHMENT A



Year	Step	Milestone	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Total
1	10	Carryover Shortfall Volume Optioned	3,000	18,700	0	0	0	0	15,600	37,300
		Volume of storage right that did not fill	90,000	70,000	4,000	45,000	20,000	150,000	70,000	449,000
	3	4/1 Predicted In-Season Shortfall	8,800	59,700	0	0	0	0	102,500	171,000
	4	May 1 additional water to secure by IGWA	5,800	41,000	0	0	0	0	86,900	133,700
	5	Day of Allocation Water Owed	3,000	18,700	0	0	0	0	15,600	37,300
	6	July Predicted In-Season Shortfall	14,400	125,300	0	0	0	0	103,600	243,300
	8	Time of Need water owed	5,800	41,000	0	0	0	0	86,900	133,700
		<b>Total Water Delivered In- Season</b>	<b>8,800</b>	<b>59,700</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>102,500</b>	<b>171,000</b>
		Final In-Season Shortfall (assuming no water provided by IGWA)	12,600	78,900	0	0	0	19,000	0	110,500
	9	Carryover	11,000	36,000	47,800	8,700	97,900	19,100	50,000	270,500
2	9	Reasonable Carryover	17,000	56,000	0	4,800	0	57,200	29,700	164,700
	9	Reasonable Carryover Shortfall	6,000	20,000	0	0	0	38,100	0	64,100
	10	Carryover Shortfall Volume Optioned	3,200	14,400	0	0	0	12,100	6,700	36,400
		Volume of storage right that did not fill	81,000	0	0	9,000	30,000	135,000	28,000	
	3	4/1 Predicted In-Season Shortfall	0	0	0	0	0	0	28,200	28,200
	4	May 1 additional water to secure by IGWA	0	0	0	0	0	0	21,500	21,500
	5	Day of Allocation Water Owed	3,200	0	0	0	0	12,100	6,700	22,000
	6	July Predicted In-Season Shortfall	0	30,300	0	0	0	0	0	30,300
	8	Time of Need water owed	0	30,300	0	0	0	0	0	30,300
		<b>Total Water Delivered In- Season</b>	<b>3,200</b>	<b>30,300</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>12,100</b>	<b>6,700</b>	<b>52,300</b>
3		Final In-Season Shortfall (assuming no water provided by IGWA)	0	5,900	0	0	0	0	0	5,900
	9	Carryover	33,400	28,000	72,800	14,500	99,500	145,800	39,300	433,300
	9	Reasonable Carryover	17,000	56,000	0	4,800	0	57,200	29,700	164,700
	9	Reasonable Carryover Shortfall	0	28,000	0	0	0	0	0	28,000
	10	Carryover Shortfall Volume Optioned	1,500	9,200	0	0	0	5,100	3,600	19,400
		Volume of storage right that did not fill	0	0	0	0	0	0	0	0
	3	4/1 Predicted In-Season Shortfall	0	8,100	0	0	0	0	66,800	74,900
	4	May 1 additional water to secure by IGWA	0	0	0	0	0	0	63,200	63,200
	5	Day of Allocation Water Owed	0	0	0	0	0	0	0	0
	6	July Predicted In-Season Shortfall	0	0	0	0	0	0	0	0
4	8	Time of Need water owed	0	0	0	0	0	0	0	0
		<b>Total Water Delivered In- Season</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
		Final In-Season Shortfall (assuming no water provided by IGWA)	0	0	0	0	0	0	0	0
	9	Carryover	36,700	99,000	90,200	37,600	150,600	365,000	64,500	843,600
	9	Reasonable Carryover	17,000	56,000	0	4,800	0	57,200	29,700	164,700
	9	Reasonable Carryover Shortfall	0	0	0	0	0	0	0	0

Illustrative Analysis of Three Consecutive Years of Shortfall Accounting.<sup>1</sup>

<sup>1</sup> Illustrative analysis does not include the revised calculations at the Time of Need as represented by Step 7 in the Order.

### Example Transient Analysis of Carryover Shortfall Volumes

Year	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Total
0	8,000	50,000	0	0	0	0	42,000	100,000
1	6,000	20,000	0	0	0	38,100	0	64,100
2	0	28,000	0	0	0	0	0	28,000
3	0	0	0	0	0	0	0	0

Reasonable Carryover Shortfalls (Acre-Feet).

Year	Total Carryover Shortfall	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
0	100,000	37,300	16,000	8,600	5,900			
1	64,100		20,400	8,600	4,500	3,100		
2	28,000			9,200	3,800	2,100	1,500	
3	0				0	0	0	0
Total		37,300	36,400	26,400	0			

Reasonable Carryover Transient Analysis Results over Four Years (Acre-Feet).

Year	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Total
1	3,000	18,700	0	0	0	0	15,600	37,300
2	3,200	14,400	0	0	0	12,100	6,700	36,400
3	1,500	9,200*	0	0	0	5,100	3,600	19,400

Reasonable Carryover Obligation by Junior Ground Water Users for each SWC Member, Proportioned by the Percentage of Total Reasonable Carryover Shortfall from the Original Carryover Shortfall Year.

\*AFRD2's space filled in year 2. Subsequently there are no carryover shortfall obligations in year 3 for carryover shortfalls that occurred in year 0 and year 1.

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER )	
TO VARIOUS WATER RIGHTS HELD BY OR FOR )	Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	
AMERICAN FALLS RESERVOIR DISTRICT #2, )	
BURLEY IRRIGATION DISTRICT, MILNER )	<b>ORDER REGARDING APRIL</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>2010 FORECAST SUPPLY</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>(Methodology Steps 3 &amp; 4)</b>
AND TWIN FALLS CANAL COMPANY )	
_____ )	

**FINDINGS OF FACT**

1. On April 7, 2010, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The Methodology Order established 10 steps for determining material injury to members of the Surface Water Coalition ("SWC"). This order will apply steps 3 and 4.

**A. Step 3**

2. Step 3 states that, within fourteen days of the issuance of the joint forecast ("Joint Forecast") prepared by the United States Bureau of Reclamation and the United States Army Corps of Engineers, the Director shall "issue a Forecast Supply for the water year and will compare the forecast supply to the baseline demand ("BD") to determine if a demand shortfall ("DS") is anticipated for the upcoming irrigation season. A separate Forecast Supply and DS will be determined for each member of the SWC." *Id.* at 34.

3. On April 8, 2010, the Joint Forecast was announced,<sup>1</sup> predicting an unregulated inflow of 1,940,000 acre-feet.<sup>2</sup>

<sup>1</sup> The Methodology Order was issued on April 7, 2010. Petitions for reconsideration were filed with the Department on April 21, 2010. Issuance of this order was delayed to allow the Director time to review the petitions for reconsideration.

<sup>2</sup> Attached hereto are the regression analyses for each SWC entity used to predict natural flow supply.

4. Based upon the Joint Forecast, the Director predicts the following:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Total Supply	BLY 2006/2008	Shortfall
A&B	0	135,371	135,371	58,492	0
AFRD2	1,256	387,102	388,358	415,730	27,400 <sup>3</sup>
BID	65,123	222,507	287,630	250,977	0
Milner	0	89,107	89,107	46,332	0
Minidoka	94,486	358,438	452,924	362,884	0
NSCC	233,145	843,169	1,076,314	965,536	0
TFCC	747,391	241,078	988,469	1,045,382	56,900
				Total	84,300

**B. Step 4**

5. Step 4 states as follows:

If the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water equal to the difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users cannot provide this information, by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users.

*Id.* at 34.<sup>4</sup>

6. As shown in the table above, it is predicted, at this time, that AFRD2 and TFCC will suffer a combined DS in the amount of 84,300 acre-feet (27,400 + 56,900). No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, their ability to secure 84,300 acre-feet.

<sup>3</sup> In its *Corrected Petition for Reconsideration of Final Order Regarding Methodology Dated April 7, 2010*, the Idaho Ground Water Appropriators, Inc. ("IGWA") raised concerns regarding natural flow diversions by AFRD2 and the interim director's initial determination of material injury. IGWA did not explain why the interim director's determination of shortfall for AFRD2 was incorrect. The interim director reviewed the method of determining the shortfall, AFRD2's water rights, and the accounting of water deliveries to AFRD2. The interim director did not find compelling information to change the initial prediction of shortfall for AFRD2.

<sup>4</sup> Steps 9 and 10 of the Methodology Order require the Director to predict reasonable carryover shortfalls to reservoir space held by member of the SWC in the fall before the subsequent irrigation season. *Methodology Order* at 36. Given when the Methodology Order was issued, junior ground water users were not under an obligation in the fall of 2009 to provide reasonable carryover shortfalls. At this time, it is forecasted that reservoir space held by members of the SWC will fill in 2010. In the fall of 2010, the Director will determine reasonable carryover shortfalls, if any, for members of the SWC. At that time, junior ground water users will be expected to comply with Steps 9 and 10, in whole or in part, or face curtailment, in whole or in part. *See id.* at 36.

7. If junior ground water users provide no water for purposes of mitigation, the Director will issue an order curtailing ground water rights junior to April 5, 1982, as simulated by the ESPA Model. Curtailment of ground water rights junior to April 5, 1982 will increase reach gains between the Near Blackfoot and Minidoka gages by a total amount of 84,361 acre-feet. Curtailing only those ground water rights located within the area of common ground water supply, IDAPA 37.03.11.050.01, will increase reach gains between the Near Blackfoot and Minidoka gages by 77,985 acre-feet. Curtailment of rights only within the area of common ground water supply will affect 73,782 acres. If junior ground water users secure a volume of water less than 84,300 acre-feet, the Director will redetermine the extent of curtailment, as simulated by the ESPA Model.

8. The 84,300 acre-feet of water required to mitigate material injury, shall be owed at the Time of Need, as established in Step 8 of the Methodology Order. At the Time of Need, the volume of water necessary to mitigate material injury to members of the SWC may be less but not greater than 84,300 acre-feet. *Id.* at 35.

### CONCLUSIONS OF LAW

1. Based upon the Joint Forecast, the Director predicts, at this time, a demand shortfall will occur to AFRD2 and TFCC's Reasonable In-Season Demand ("RISD"); thereby resulting in material injury. IDAPA, 37.03.11.042. At this time, the predicted material injury to AFRD2 is 27,400 acre-feet. At this time, the predicted material injury is to TFCC 59,900 acre-feet. At this time, no other members of the SWC are predicted to suffer material injury during the 2010 irrigation season. The total predicted material injury to RISD for members of the SWC in the 2010 irrigation season shall be no greater than 84,300 acre-feet.

2. No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, that they have secured 84,300 acre-feet.

3. The predicted volume of water required to mitigate material injury shall be owed at the Time of Need, as established in Step 8 of the Methodology Order. The volume of water necessary to mitigate material injury at the Time of Need may be less, but not greater than 84,300 acre-feet.

4. If junior ground water users provide no water for purposes of mitigation, the Director shall issue an order curtailing ground water rights junior to April 5, 1982, which will increase reach gains between the Near Blackfoot and Minidoka gages by 84,361 acre-feet. Curtailing only those ground water rights located within the area of common ground water supply, IDAPA 37.03.11.050.01, will increase reach gains between the Near Blackfoot and Minidoka gages by 77,985 acre-feet. Curtailment of rights only within the area of common ground water supply will affect 73,782 acres. If junior ground water users secure a volume of water less than 84,300 acre-feet, the Director will redetermine the extent of curtailment, as simulated by the ESPA Model.

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Director predicts, at this time, a demand shortfall of 27,400 acre-feet to AFRD2's reasonable in-season demand. The Director also predicts a demand shortfall, at this time, of 56,900 acre-feet to TFCC's reasonable in-season demand. At this time, no other members of the SWC are predicted to experience material injury during the 2010 irrigation season. The maximum, combined demand shortfall for members of the SWC during the 2010 irrigation season is 84,300 acre-feet.

No later than May 13, 2010 (fourteen days from issuance of this order), junior ground water users must establish, to the satisfaction of the Director, that they have secured 84,300 acre-feet of storage water to mitigate for the predicted material injury. If junior ground water users cannot establish, to the satisfaction of the Director, that they have secured the required volume of water, in whole or in part, the Director shall issue an order curtailing junior ground water users, in whole or in part, for the material injury caused to the injured members of the SWC.

IT IS FURTHER ORDERED that junior ground water users are not required to provide the secured volume of mitigation water until after the Director determines the SWC's Time of Need, as established in Step 8 of the Methodology Order. The volume of water required for mitigation at the Time of Need may be more or less for individual SWC members, but the combined volume will not be greater than 84,300 acre-feet.

IT IS FURTHER ORDERED that if junior ground water users provide no water for purposes of mitigation, the Director shall issue an order curtailing ground water rights junior to April 5, 1982. The curtailment shall affect 73,782 acres within the area of common ground water supply in Water District Nos. 34, 110, 120, 130, and 140, and will increase reach gains by 77,985 acre-feet. If junior ground water users secure a volume of water less than 84,300 acre-feet, the Director will redetermine the extent of curtailment, as simulated by the ESPA Model. Curtailment shall apply to consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of issuance of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a

written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

Dated this 29<sup>th</sup> day of April, 2010.

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

GARY SPACKMAN  
Interim Director

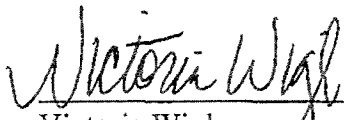
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of April, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

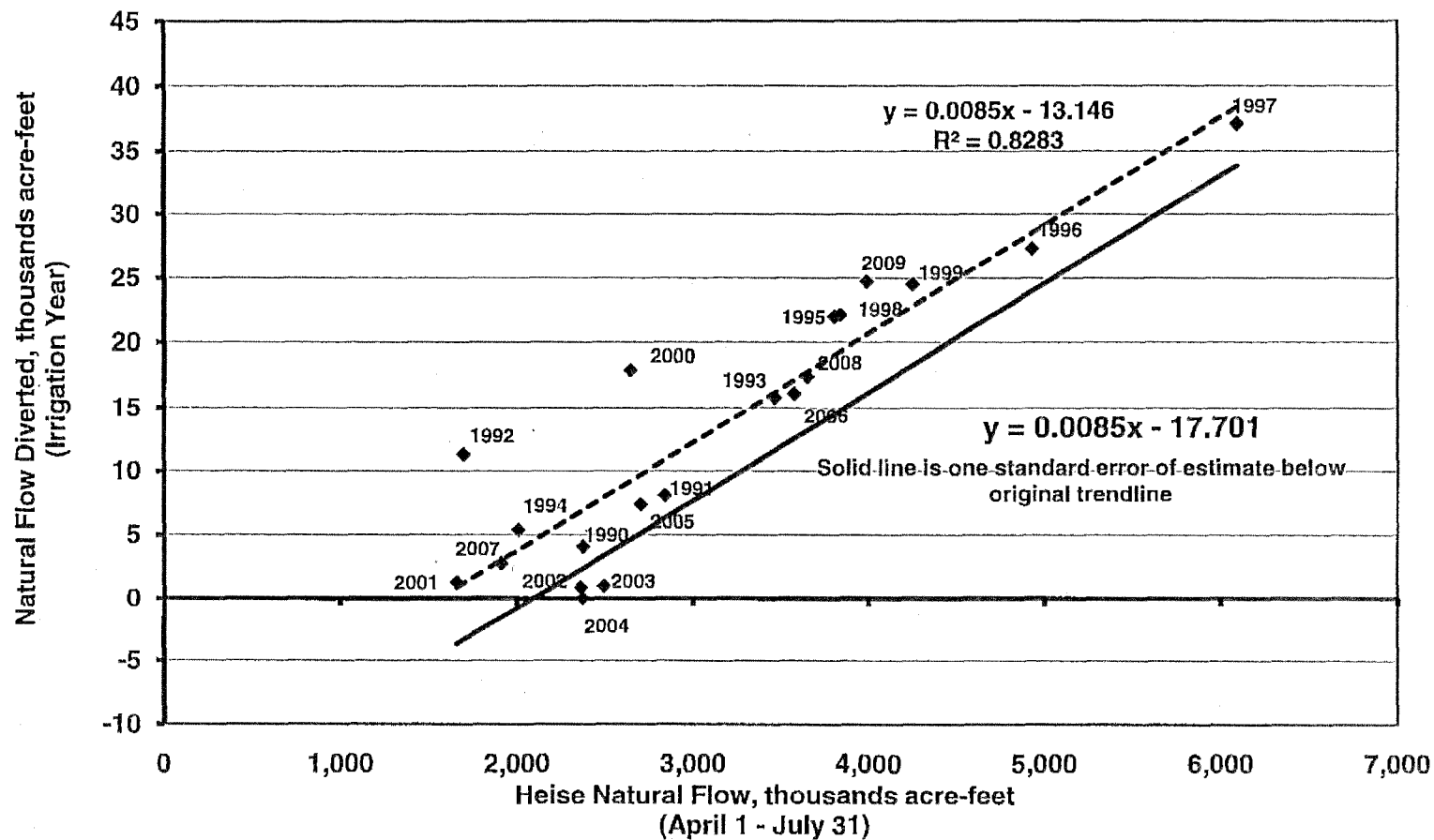
John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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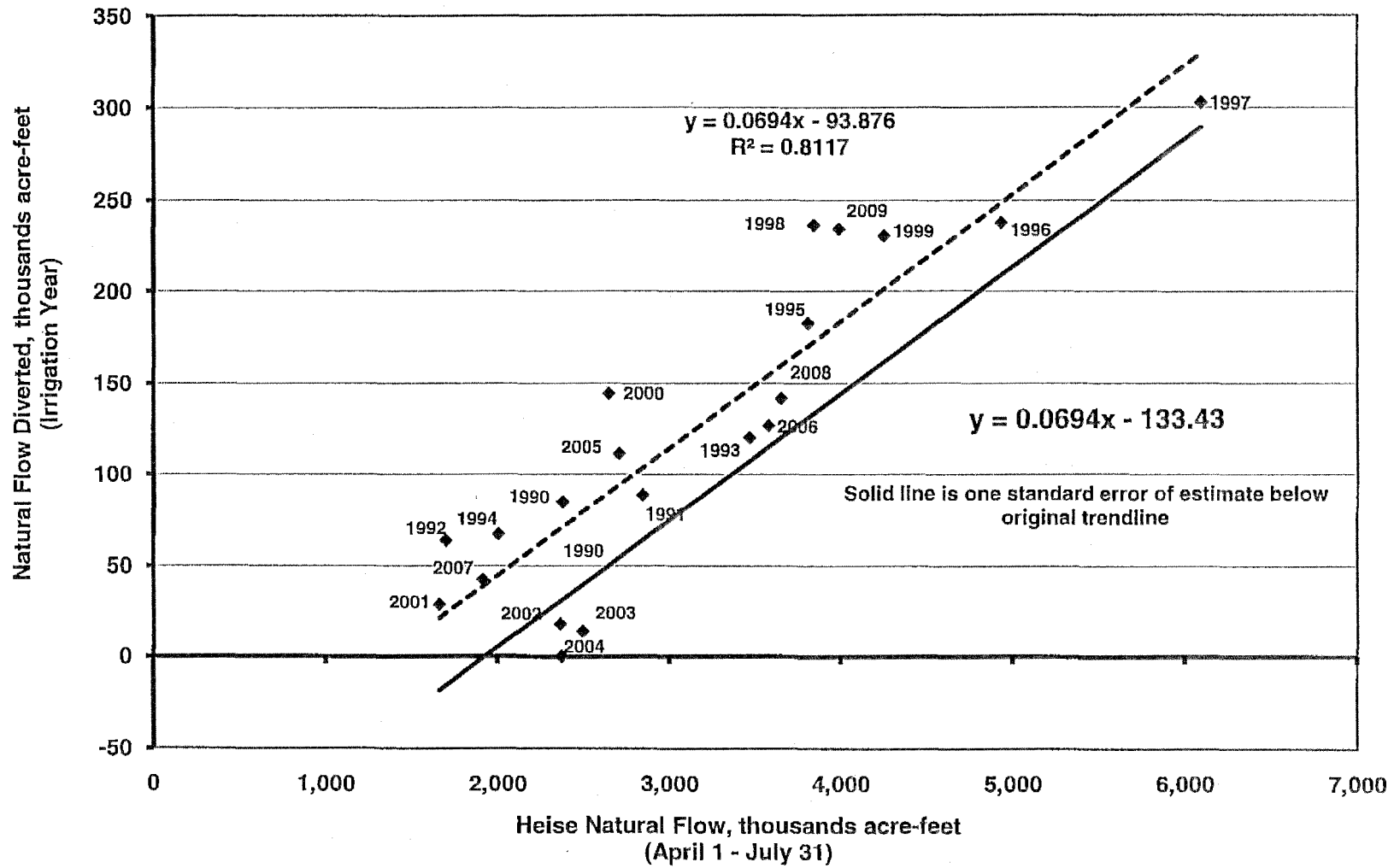
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Victoria Wigle  
Administrative Assistant to the Director

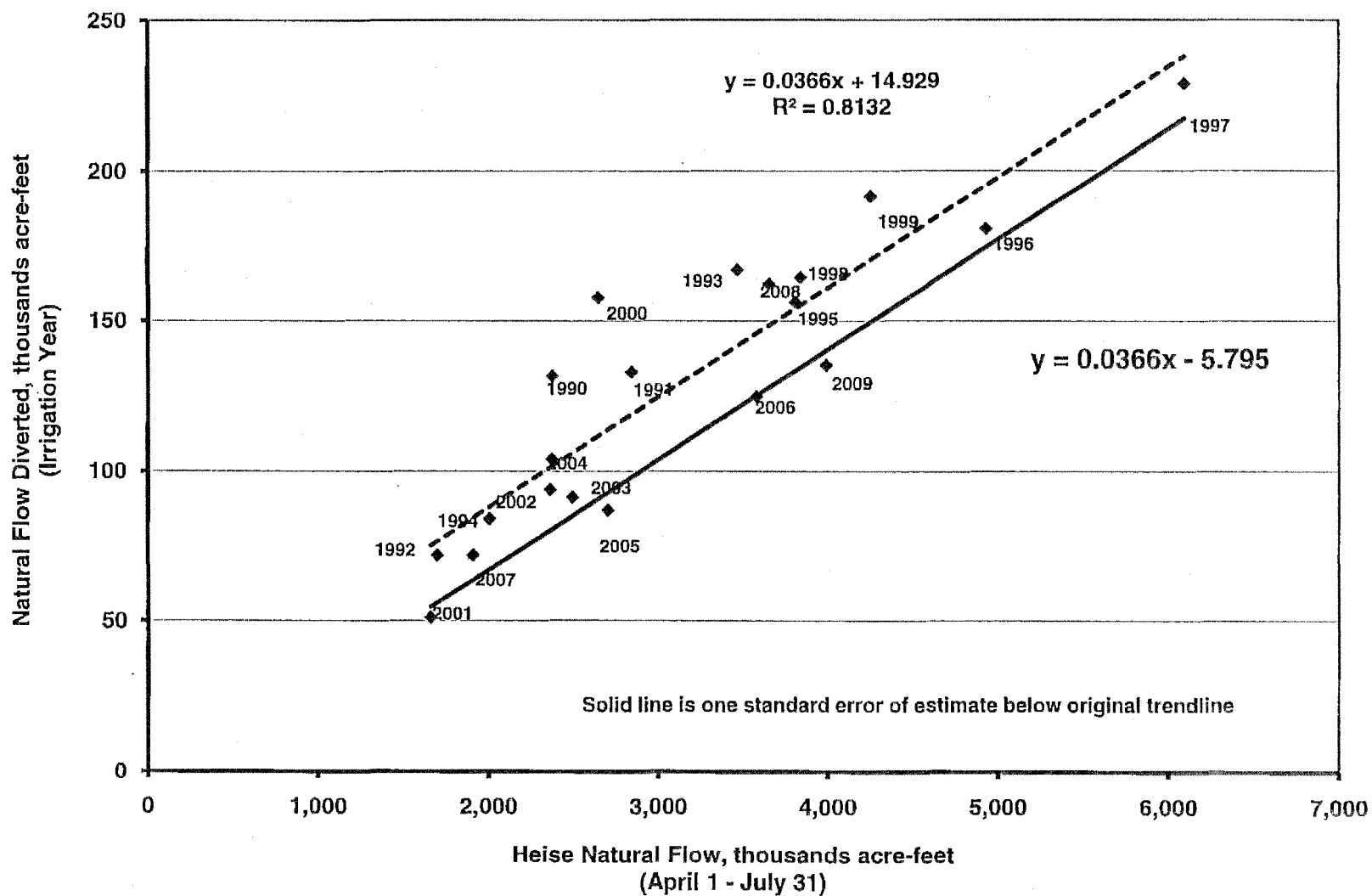
# A & B IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



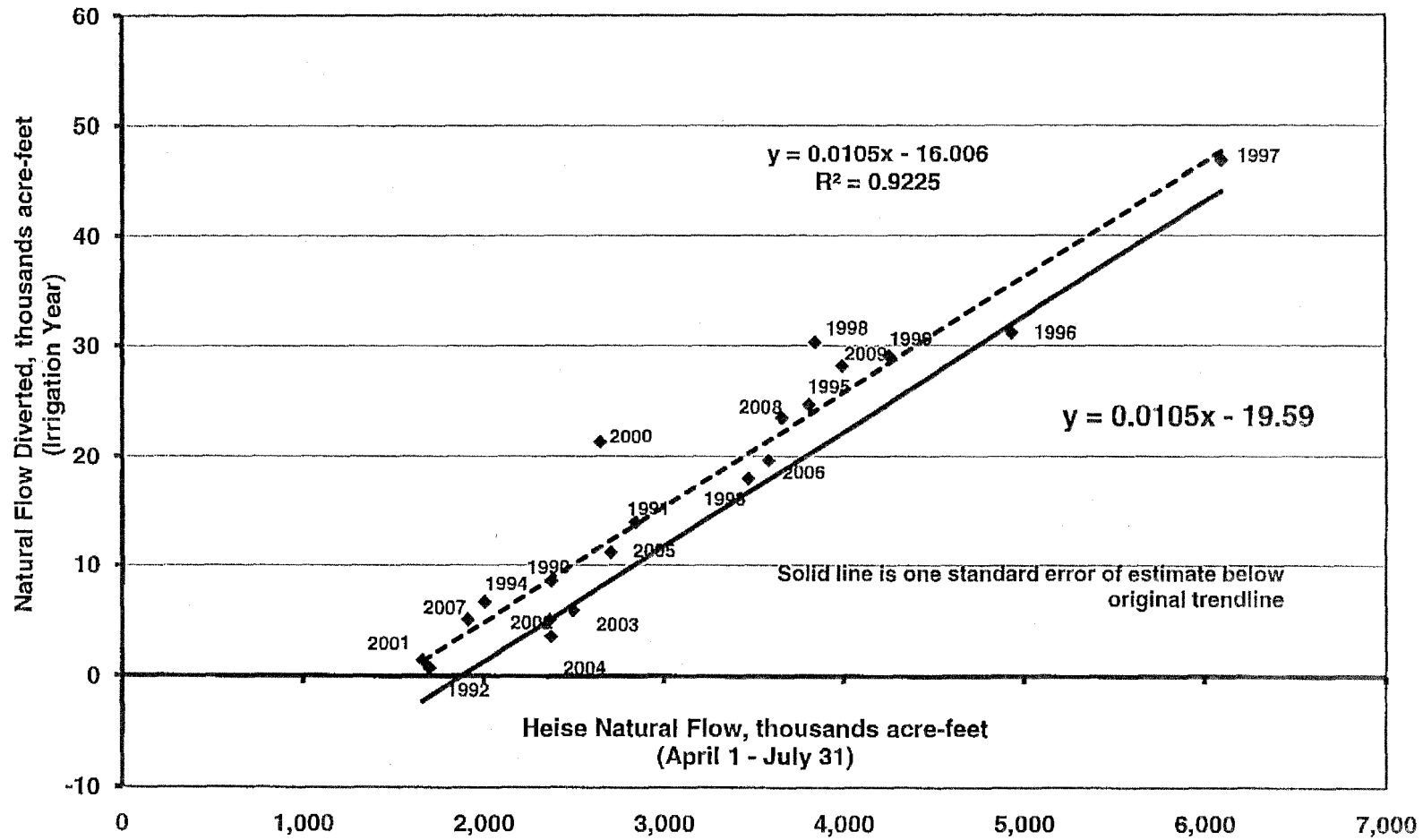
# AMERICAN FALLS RESERVOIR DISTRICT #2 Natural Flow Diversions with Heise Inflow



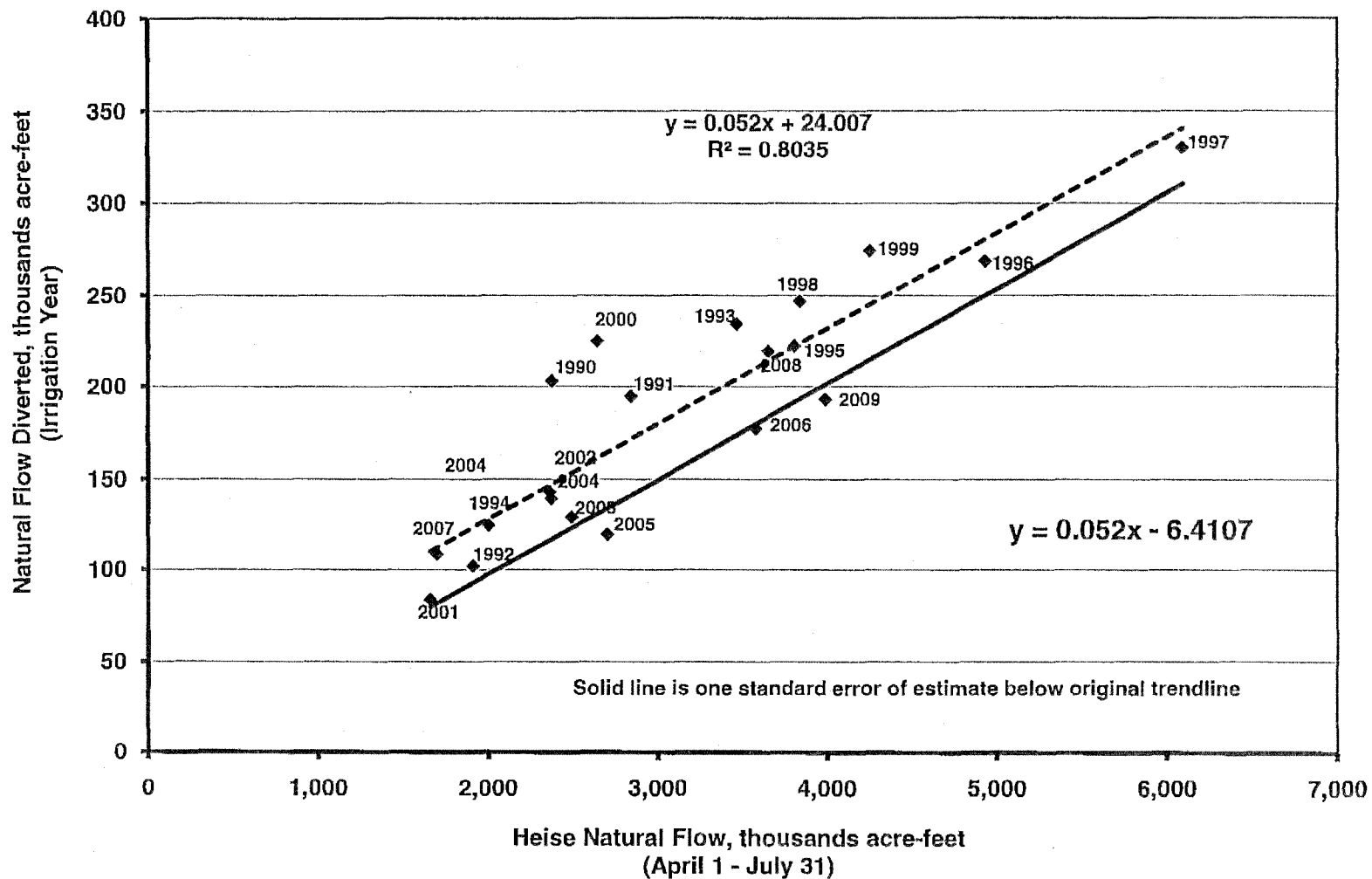
**BURLEY IRRIGATION DISTRICT**  
**Natural Flow Diversions with Heise Inflow**



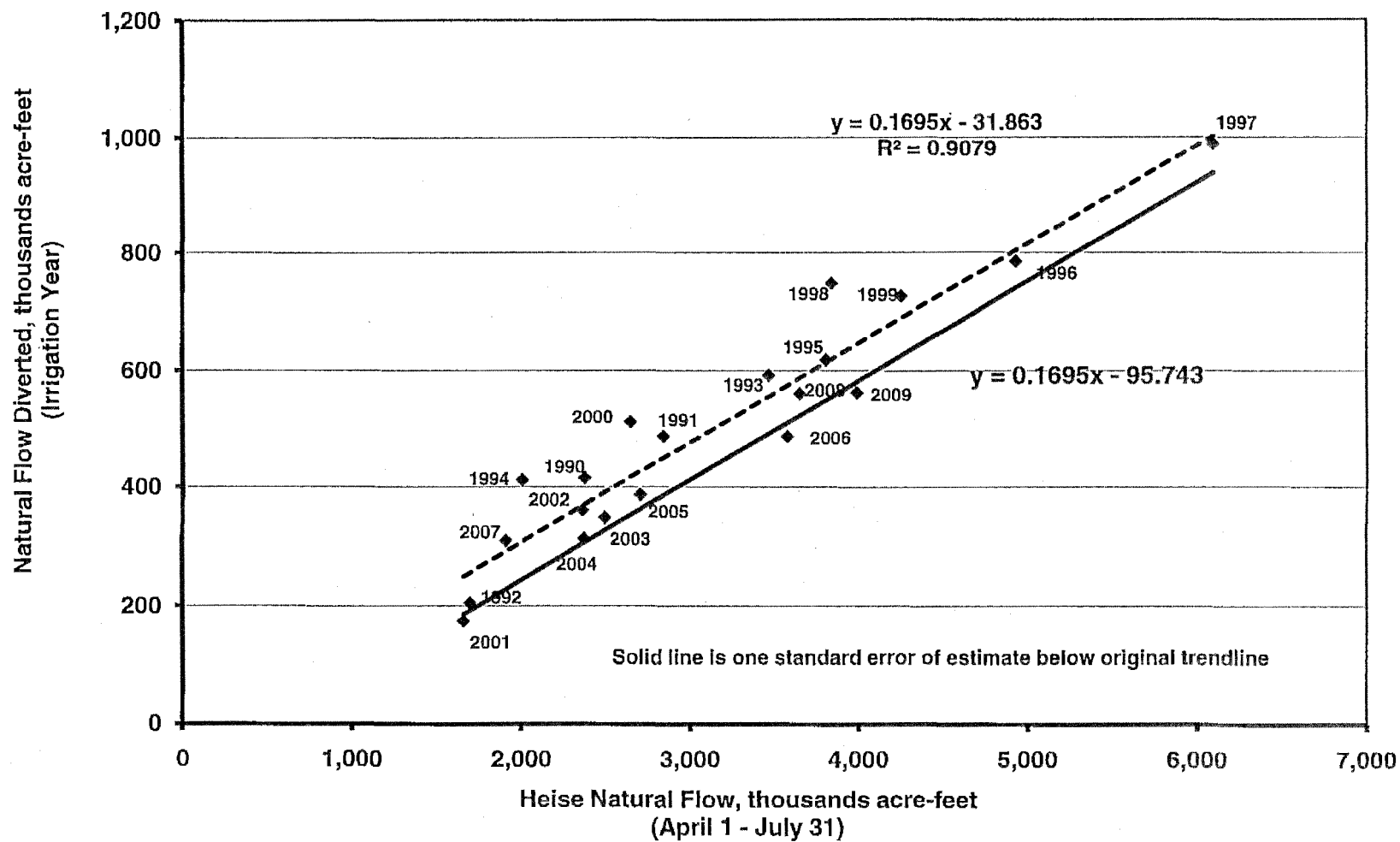
# MILNER IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



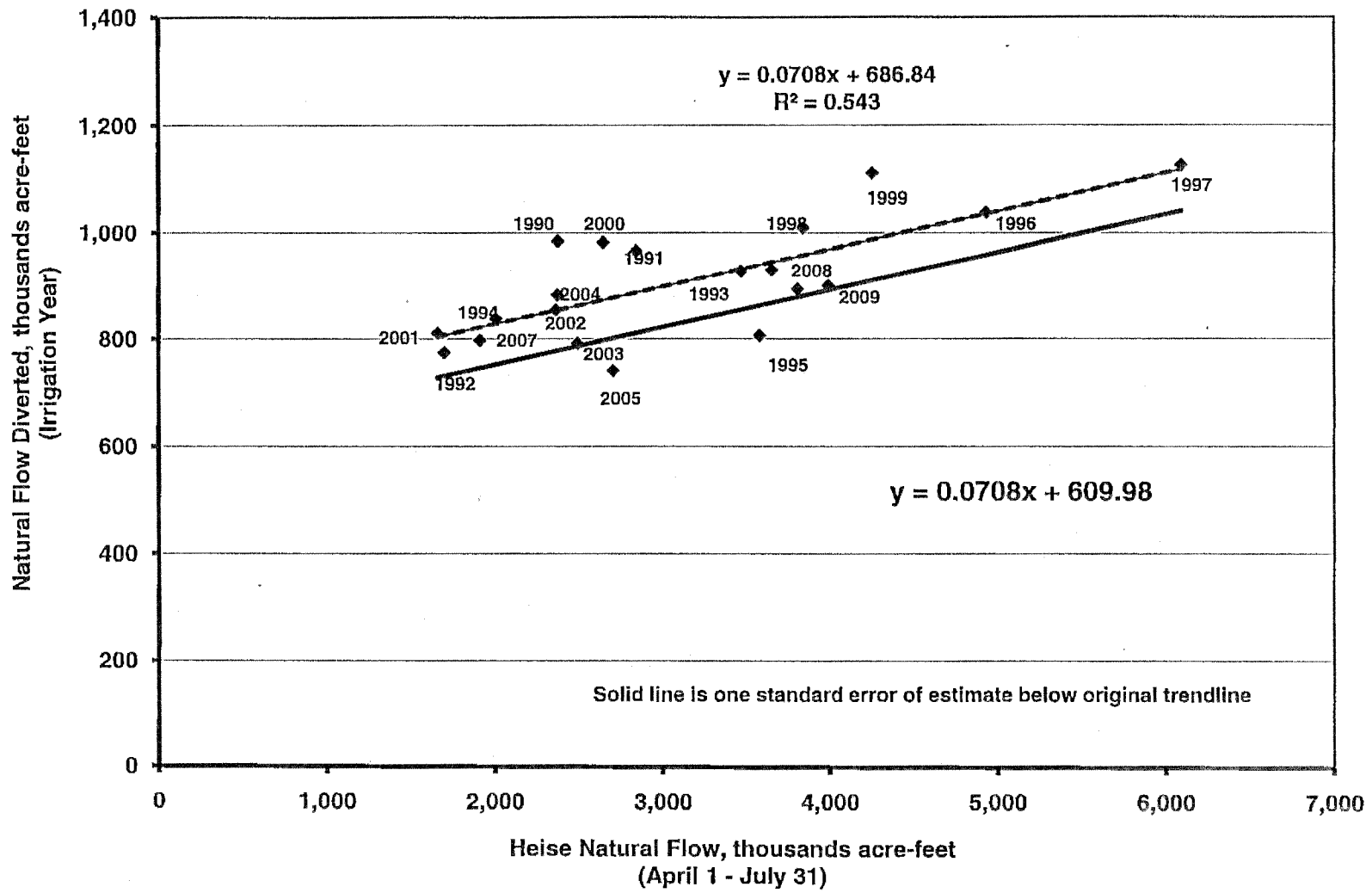
# MINIDOKA IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



NORTH SIDE CANAL COMPANY  
Natural Flow Diversions with Heise Inflow



# TWIN FALLS CANAL COMPANY Natural Flow Diversions with Heise Inflow







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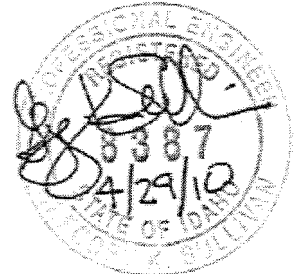
### Memorandum

TO: Sarah Klahn  
Mitra Pemberton

FROM: Spronk Water Engineers, Inc.; Gregory K. Sullivan

DATE: April 29, 2010

RE: April 7, 2010 IDWR Final Order Regarding Methodology for Determining  
Material Injury to Reasonable In-Season Demand and Reasonable  
Carryover (SWE Project No. 155.02.POC)



On April 7, 2010, the Interim Director of the Idaho Department of Water Resources ("IDWR") issued a Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover ("April 7<sup>th</sup> Order" or "Modified Protocol"). The April 7<sup>th</sup> Order describes IDWR's proposed methodology for administering the delivery call on the Snake River made by the members of the Surface Water Coalition ("SWC").

This memorandum represents our initial comments on certain provisions contained in the Modified Protocol, and we reserve the right to modify these comments and/or provide additional comments based on further review of the April 7<sup>th</sup> Order. In addition, we reserve the right to provide additional comments after further reviewing the technical information and analysis utilized by IDWR in developing the Modified Protocol, as well as the as-applied implementation of the Modified Protocol.

Attachment 3

Use of Historical Diversions to Determine Baseline Water Requirements

The Modified Protocol provides that historical diversions will be used to determine the baseline water requirements of the SWC members. Based on review of hydrologic and climatologic data, the Interim Director determined that the average of the diversions made by the SWC members in 2006 and 2008 should be used as the Baseline Year ("BLY") for making the initial determination at the beginning of the irrigation season of the Reasonable In-Season Demand ("RISD"). The April 7<sup>th</sup> Order states that the BLY should "represent a year(s) of above average diversion ... above average temperatures and ET, and below average precipitation to ensure that increased diversions were a function of crop water need and not other factors." April 7<sup>th</sup> Order at 5, FOF 16.

The information provided by IDWR in the April 7<sup>th</sup> Order does not support IDWR's position that diversions in years of above average ET and below average precipitation represent the amount of water necessary to meet the crop water needs of the SWC members. To the extent that historical diversions were greater than were necessary to meet the crop water demands, use of those diversions in establishing the baseline water requirements of the SWC will result in curtailment of junior ground water users (or mitigation) in order to provide water in excess of the SWC needs. This is not consistent with full economic development and maximum utilization of Idaho's water resources.

Further, use of above-average historical diversions to represent the SWC irrigation water demands is not consistent with the April 29, 2008 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation issued by the IDWR Hearing Officer, Gerald F. Schroeder, in the Surface Water Coalition Delivery Call Hearing ("2008 Opinion"). The 2008 Opinion contains the following statements that are instructive on how the administration protocol should be developed:

- [T]he Department must modify the minimum full supply analysis as a method of establishing a baseline of predicted water need for projecting material injury. 2008 Opinion at 51, ¶ XIV 7.

- [I]t is time for the Department to move to further analysis to meet the goal of the minimum full supply but with the benefit of the extended information and analysis offered by the parties and available to its own staff. Ibid.
- Properly applied, the minimum full supply approach is an attempt to measure, for purposes of determining if there should be curtailment, the amount of water senior surface water users need to raise crops of their choosing to maturity. Ibid.
- Within this context there are issues of the reasonableness of diversion and conveyance practices, and the conservation efforts of the water users. Ibid.
- The isolation of a year when there are known facts as to the supply and use may be reasonable if it is subjected to the type of analysis applied by both the surface and ground water users. However, focusing on a single year can only be a starting point, not sufficient without material adjustments. Those adjustments are reflected in the analyses of the ground water users and the surface water users in attempting to establish annual diversion requirements. 2008 Opinion at 51-52, ¶ XIV 7.
- Predictions of need should be based on an average year of need, subject to adjustment up or down depending upon the particular water conditions for the irrigation season. 2008 Opinion at 49, ¶ XIV 2.
- There are scientific approaches well beyond what water was taken and used that the parties have utilized in order to establish the amount of water SWC members actually need to meet full crop years [sic] over time. 2008 Opinion at 51, ¶ XIV 3.

The BLY methodology described in the Modified Protocol is not appropriate for determining the initial water requirements of the SWC members because it does not contain the modifications and adjustments that are necessary to determine the amount of water that is actually needed by the SWC members to meet their crop water demands. Further, the BLY methodology is not consistent with the Hearing Officer's mandate that it be based on an average year of need, subject to adjustment up or down. Instead, the Modified Protocol provides for determination of baseline water needs based on years above average diversions, above average temperatures and ET, and below average precipitation.

Assessment of Predicted Shortages to TFCC

To illustrate the concerns regarding the Modified Protocol, the predicted 2010 shortage to the Twin Falls Canal Company ("TFCC") summarized in the April 14, 2010 letter from IDWR was evaluated by comparing it to the shortage that would result from computing the RISD using (a) a weighted average project efficiency derived from the after-the-fact IDWR monthly project efficiency values described in the April 7<sup>th</sup> Order, and (b) a reasonable project efficiency computed from a reasonable on-farm application efficiency for TFCC and the reported conveyance loss for the TFCC. These comparisons are shown in **Table 1**.

The baseline RISD of 1,045,382 acre-feet ("af") from the April 14, 2010 IDWR Letter for the TFCC is shown in the first column of numbers in **Table 1**. The baseline RISD was computed as the average of what TFCC diverted in 2006 and 2008. Compared to the forecast 2010 supply for the TFCC of 988,469 af, IDWR projects a shortage to TFCC of 56,913 af (rounded to 56,900 af).

The second column of numbers in **Table 1** shows the irrigation season water demand that would be computed for TFCC based on the average annual crop irrigation requirement ("CIR") and a weighted average after-the-fact project efficiency of 43.6% derived from the monthly IDWR figures (weighted by monthly CIR)<sup>1</sup>. This result, using IDWR's numbers, is a projected RISD of 897,359 af. Comparison of this demand to projected supply of 988,469 af shows that there would be no projected shortage to TFCC in 2010.

The absence of a shortage computed using IDWR's after-the-fact project efficiency is significant because it shows the effect of removing the bias in the Modified Protocol that arises from computing the baseline demand so as to "represent a year(s) of above average diversion ... above average temperatures and ET, and below average precipitation." Removal of that bias using IDWR's after-the-fact project efficiency value, as shown in **Table 1**, is sufficient to eliminate the forecast shortage in 2010.

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<sup>1</sup> Derivation of the weighted average after-the-fact project efficiency is described later in the memorandum.

The record in this matter allows IDWR to refine this approach further. As shown in the third column of numbers in **Table 1**, the computed RISD using a reasonable project efficiency can be computed using TFCC efficiency figures contained in the record (a reasonable on-farm application efficiency of 60% and a conveyance of 12%, as reported by Vince Alberdi)<sup>2</sup>. The resulting computed RISD is 738,100 af. Compared to the forecast total supply for the TFCC of 988,500 af, there would be no shortage to TFCC in 2010.

The above analysis of the projected water supply and demand for the TFCC shows that the projected shortage to the TFCC in 2010 described in the April 14 Letter from IDWR is overstated.

The remainder of this memorandum is devoted to discussion of methods to further refine the project efficiencies developed by IDWR, including how those efficiencies should be modified to consider reasonable on-farm application efficiencies and reported conveyance losses.

#### Review of IDWR Project Efficiencies

The April 7<sup>th</sup> Order contains monthly project efficiencies that IDWR proposes to use in adjusting the RISD of the SWC members determined at the beginning of the irrigation season. These adjustments will be made approximately halfway through the irrigation season, near the end of the irrigation season, and after the end of the irrigation season.

IDWR will compute adjusted in-season water demands by tabulating the actual CIR in the current year (to the date of the adjustment) for each of the SWC members based on their irrigated area, cropping pattern, and unit CIR data from the USBR Agrimet data. IDWR proposes to divide the monthly CIR values by the monthly project efficiency values listed in FOF 44 of the April 7<sup>th</sup> Order to compute updated monthly diversion

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<sup>2</sup> The reasonable on-farm application efficiency and reported conveyance loss for the TFCC is described later in the memorandum.

requirements. These adjusted diversion requirements will be substituted for the monthly RSD values, and revised annual water requirements will be computed.

In the April 7<sup>th</sup> Order, IDWR attempts to draw a parallel between its use of project efficiencies and the way that irrigation efficiencies were used by the experts in the SWC Delivery Call litigation:

Given that the water balance method for estimating annual diversion requirements is subject to varying results based on the range of parameters used as input, an alternate approach is to assume that unknown parameters are practically constant from year-to-year across the entire project. Project efficiency is a term used to describe the ratio of total volumetric crop water need within a project's boundary and the total volume of water diverted by that project to meet crop needs. It is the same concept as system efficiency, which was presented at the hearing Exhibit 3007 at 28-29. Implicit in this relationship are the components of seepage loss (conveyance loss), on-farm application losses (deep percolation, field runoff), and system operational losses (return flows). By utilizing project efficiency and its input parameters of crop water need and total diversions, the influence of the unknown components can be captured and described without quantifying each of the components.

FOF 41 at 15-16

Contrary to the above statement, IDWR's "project efficiency" is not the same as the "system efficiencies" developed by the SWC and Pocatello experts during the SWC Delivery Call litigation. IDWR's "project efficiency" fails to incorporate a "reasonableness" evaluation as required by Idaho law and the 2008 Order. As such, the project efficiencies for some of the SWC members are too low, as illustrated in Table 1 for the TFCC, with the result that shortages to the SWC members are over-predicted.

By contrast, both the Pocatello experts and the SWC experts estimated on-farm efficiency and conveyance loss in order to translate the CIR into the amount of water that is needed at the river headgate to meet crop demands. Reasonable project efficiency should be computed as the product of reasonable on-farm efficiency multiplied by reasonable conveyance efficiency (1 - conveyance loss). Applying a reasonableness test to

computation of the project efficiencies helps avoid a windfall for seniors through over-prediction of shortages.

Use of after-the-fact project efficiencies in administration as proposed by IDWR is inappropriate because it has the potential to reward inefficient operation and may result in unnecessary curtailment or mitigation of junior ground water users to provide additional supplies to the senior users that are not actually needed to meet crop demands. This is contrary to maximum utilization and full economic development.

To illustrate the differences between reasonable project efficiency and the after-the-fact project efficiency derived by IDWR, several analyses were performed as described herein.

#### Problems with Use of Monthly Project Efficiencies

The monthly project efficiencies computed by IDWR are shown in **Table 2**. A chart illustrating the monthly project efficiencies is shown at the bottom of **Table 2**. The values shown in **Table 2** were taken from the supporting information provided by IDWR on April 21, 2010. Included in those materials was a spreadsheet containing a table entitled "Summary of Corrected Average PE Values – 2001:2008." It was assumed that IDWR intends to replace the monthly project efficiencies in FOF 44 of the April 7<sup>th</sup> Order with the corrected values.

One of the problems with IDWR's use of project efficiencies lies in the way that the after-the-fact project efficiency was computed. Computing an after-the-fact project efficiency based on the CIR divided by the volume of water diverted is appropriate when that calculation is performed on a seasonal basis. However, this method is not appropriate for computing after-the-fact project efficiency based on monthly or other short-term data. The reason is that using the CIR in the numerator of the calculation does not consider the portion of the diversion that may have gone into soil moisture, but was not immediately consumed.

For example, consider an irrigator that diverted 100 acre-feet in April, and 20 acre-feet was consumed and 40 acre-feet went into soil moisture storage. Using IDWR's definition, the computed after-the-fact efficiency for April would be 20% ( $20 \text{ af} / 100 \text{ af}$ ). However, the real after-the-fact efficiency would have been 60% ( $[20 \text{ af} + 40 \text{ af}] / 100 \text{ af}$ ), as the water that went into soil moisture storage was made available for later consumption.

IDWR's method of computing monthly after-the-fact project efficiency can result in quirky and somewhat nonsensical results. Such results are evident in the IDWR project efficiency values shown in **Table 1** that bounce around from month to month and user to user, and include some very low values at the beginning and end of the irrigation season, and also include two values in excess of 100% in April.

IDWR's proposed use of monthly after-the-fact project efficiencies in administration has the potential to result in unintended dramatic swings in computed diversion demands. This is illustrated in the two charts included in **Figure 1** for the TFCC. The green lines in the upper chart depict the average (dotted line) and maximum (solid line) monthly values of CIR. The black lines show the monthly diversion requirements that would be computed by dividing the monthly CIR values by IDWR's proposed monthly project efficiencies.

The lower chart in **Figure 1** shows the difference between the average and maximum CIR values and the average and maximum computed diversion requirements. The difference between the monthly average and maximum CIR values for TFCC is less than 20,000 af. However, these modest differences in CIR translate into substantial differences in diversion requirements at the beginning and end of the irrigation season when the project efficiencies determined by IDWR are low. IDWR's project efficiency of 11% in October unreasonably dictates that every acre-foot of CIR in October requires 9 af of diversion demand to meet it. It is similarly unreasonable that the difference between an average and dry October would result in 100,000 acre-feet of additional diversions that are needed by TFCC in that month.



Due to the problems described above regarding the use of varying monthly project efficiencies, we propose that IDWR develop seasonal project efficiencies to use in administering the SWC delivery call.

#### Annual After-The-Fact Project Efficiencies

IDWR's table of monthly after-the-fact project efficiencies includes a line at the bottom showing the arithmetic average of monthly values. The arithmetic average of the monthly values is of limited use because it weights the low efficiency values at the beginning and end of the season, when relatively less water is being diverted and consumed, the same as the values during the middle of the irrigation season. It is more meaningful to compute a weighted-average efficiency with the weighting based on monthly CIR or the monthly diversions. Alternatively, the seasonal or annual after-the-fact project efficiency can be computed as the annual crop water requirement divided by the annual diversions. Both approaches should give similar results.

Weighted-average annual after-the-fact project efficiencies were computed for each of the SWC members by weighting the monthly efficiency values by the monthly CIR data contained in the supporting data for the April 7<sup>th</sup> Order. Derivation of the weighted average values is shown in **Table 3**.

IDWR computed after-the-fact project efficiencies based on the average of monthly values from wet, average, and dry years during the period from 2000 – 2008. During years of adequate water supply, there is limited incentive for the irrigators under most of the SWC systems to conserve water. In those years, the SWC members typically establish a full or near full "allocation" of water for their irrigators, and the irrigators may use up to the full allocation, whether or not full amount is needed to satisfy their crop demands<sup>1</sup>. Irrigating with more water than is necessary to meet crop demands can make

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<sup>1</sup> The SWC members typically set annual irrigation allocations for their members based on long-standing practice. In general, the "full" irrigation allocations have remained relative steady over time despite the substantial advancements in on-farm irrigation through conversions to sprinklers and advances in irrigation water management.

on-farm management of the irrigation supply easier (e.g., farmers need not change irrigation sets as frequently). However, over-diversion of water for ease of irrigation should not be the basis for curtailment of junior ground water users, and is not consistent with maximum utilization of the resource.

To the extent that IDWR insists on using after-the-fact project efficiencies in administration, these should be computed using only data from dry years when the SWC members were more efficient than during average or wet years.

#### Annual Reasonable Project Efficiencies

The reasonableness of the project efficiencies developed by IDWR was assessed by comparing them to project efficiencies derived from (a) on-farm irrigation efficiencies used by IDWR or the SWC experts, and (b) conveyance losses reported by the SWC members.

Reasonable on-farm irrigation efficiencies were computed for the each of SWC members based on (a) sprinkler application efficiencies contained in the January 29, 2008 Order in the A&B Delivery Call matter, and (b) the gravity irrigation application efficiency used by the SWC experts. These sprinkler and gravity irrigation efficiency values are summarized in **Table 4**.

In evaluating the delivery call by the B Unit of the A&B Irrigation District ("A&B Delivery Call"), IDWR assessed the adequacy of the B Unit water supply assuming that the irrigators in that system could operate at an overall project efficiency of 75%. See A&B Order at 12, FOF 50. This overall project efficiency figure included a 3% conveyance loss in the B Unit. Dividing the 75% overall efficiency by a 97% conveyance efficiency results in a 77% on-farm application efficiency for the B Unit.

IDWR based its estimate of on-farm application efficiency in the B Unit on the following ranges of reported application efficiencies for sprinklers:

<u>Sprinkler System</u>	<u>Application Efficiency</u>
Stationary lateral (wheel or hand move)	60 – 75%
Solid set lateral	60 – 85%
Center pivot lateral	75 – 85%

See A&B Order at 12, FOF 47.

IDWR used the 75% overall project efficiency as part of its determination of whether the B Unit was suffering irrigation water shortages as a result of the impact of pumping by junior ground water users. There is no reason why a similar approach should not be used in evaluating the SWC Delivery Call

The A&B Order did not include a finding regarding the application efficiency for gravity irrigation methods because there is very little use of this application method under the B Unit. However, there was general agreement between the Pocatello experts and the SWC experts as to reasonable on-farm application efficiencies for gravity irrigation. The Pocatello experts used gravity application efficiencies ranging from 55% to 60% in their water budget analyses (see 9/26/2007 Franzoy Report at 11, Table 5). The SWC experts used an average gravity irrigation efficiency of 55% in the SWC delivery call (see 11/7/2007 Rebuttal Report of Direct Testimony and Expert Report of Gregory Sullivan and Eugene Franzoy at 3). The SWC experts used a gravity application efficiency of 60% in the A&B delivery call (see 7/16/2008 A&B Irrigation District Expert, Table 4-7). For purposes of illustration, a reasonable gravity application efficiency of 55% was assumed in deriving on-farm application efficiencies for the SWC members for the analyses described herein.

Weighted average reasonable on-farm application efficiencies for the SWC members were computed using the IDWR and SWC on-farm efficiencies described above, and irrigated areas for each SWC members supplied by center pivot sprinklers, other sprinklers, and gravity methods. The irrigated area data came from the September 26, 2007 expert report of Gene Franzoy that was submitted in the SWC Delivery Call hearing on behalf of Pocatello. The resulting weighted average reasonable on-farm irrigation

efficiency figures are summarized at the bottom of **Table 4**, and range from 60.3% for the TFCC to 74.1% for the NSCC.

Reasonable project efficiencies were computed based on the product of the reasonable on-farm efficiencies from **Table 4** and the conveyance losses reported by the SWC members, as contained in the September 26, 2007 SWE expert report. The on-farm efficiencies, conveyance losses, and computed reasonable project efficiencies are shown in **Table 5**. The computed reasonable project efficiencies were compared to the weighted average project efficiencies from the April 7<sup>th</sup> Order in **Table 3**. A chart illustrating the project efficiency figures is shown at the bottom of **Table 5**.

The results in **Table 5** show that the after-the-fact project efficiencies for A&B, AFRD2, BID, Milner and MID are equal to or greater than the computed reasonable project efficiencies. This means that these users are operating toward the upper end of the ranges of recognized efficiencies for sprinkler and gravity methods. For purposes of administering the delivery call, these users should be expected to continue their efficient operation.

Conversely, the after-the-fact project efficiencies for the NSCC and the TFCC shown in **Table 4** are substantially lower the computed reasonable project efficiencies. This means that both NSCC and TFCC are operating at efficiencies that are lower than expected and lower than what is reasonable. The following is a summary of the computed reasonable and after-the-fact project efficiencies for TFCC and NSCC

**Summary of Reasonable Project Efficiencies  
And Project Efficiencies from April 7th Order (corrected)  
NSCC and TFCC**

Project Efficiency	NSCC	TFCC
Reasonable	49.6%	53.0%
April 7 <sup>th</sup> Order	39.6%	43.6%
Difference	-10.0%	-9.4%

The above differences between the reasonable and after-the-fact project efficiencies result in significant differences in computed diversion requirements using the administration protocol described in the April 7<sup>th</sup> Order. The average annual CIR computed by IDWR over the 2000 – 2008 period was 347,000 acre-feet per year ("af/y") for NSCC and 391,000 af/y for TFCC (derived from data in DS & RISD Calculator.xlsx from IDWR). Dividing these average annual CIR amounts by the weighted average project efficiency gives the estimated average annual diversion requirement. The following is a summary of the average annual diversion requirements for NSCC and TFCC computed using reasonable project efficiencies and the after-the-fact project efficiencies from the April 7<sup>th</sup> Order.

**Summary of Annual Diversion Requirement  
Based on Reasonable Project Efficiencies  
And Project Efficiencies from April 7<sup>th</sup> Order  
NSCC and TFCC**

Annual Diversion Demand Based On	NSCC	TFCC
Reasonable Project Efficiency	700,000	739,000
April 7 <sup>th</sup> Order Project Efficiency	877,000	897,000
Difference	177,000	158,000

Each percentage point difference in project efficiency translates into a difference in the annual diversion requirement of 17,700 af/y for NSCC and 16,900 af/y for TFCC.

The project efficiencies computed by IDWR for NSCC and TFCC are lower than what is reasonable. Determination of shortages to NSCC and TFCC for purposes of curtailment or mitigation should be based on seasonal values of reasonable project efficiency of at least 50% for NSCC and 53% for TFCC.

All project efficiencies used in administering the SWC Delivery Call should continue to be reviewed in the future to consider the effect of continued conversions to sprinklers.

### **Proposed Method for Computing RISD, Shortage and Mitigation Requirement**

We propose that IDWR determine the baseline water demand for each of the SWC members using an approach that is similar to the method that it has proposed for making mid-season and post-season adjustments to the RISD. The proposed methodology would involve the following steps:

1. Compute the average annual CIR based on (a) actual irrigated area, (b) cropping pattern, and (c) the average annual unit CIR amounts for the various crops.
2. Compute the annual RISD necessary to meet the crop water demands based on the average annual CIR volume from Step 1 divided by an annual "administrative project efficiency" (see below).
3. Compare the annual RISD from Step 2 to the available water supply (sum of project natural flow supply plus available storage water) to compute the shortage and required mitigation at the beginning of the season.
4. Recalculate the RISD, shortage, and mitigation requirement during and after the irrigation season based on actual CIR determined using Agrimet ET and precipitation data.

The proposed methodology for computing the RISD, shortage, and mitigation requirements would be consistent with the 2008 Opinion and would be consistent with the water budget approaches that were proposed by the experts in the SWC Delivery Call litigation.

### **Determination of Administration Project Efficiency**

A reasonable project efficiency would be computed for each of the SWC members based on the product of the conveyance efficiency (1 minus the conveyance loss) and the reasonable on-farm efficiency. The computed reasonable project efficiency would be compared to annual after-the-fact project efficiency computed from recent water use data and CIR calculations (e.g., during the last 10 years), and the lesser of the two efficiency figures should be designated as the "administration project efficiency" to be used in computing the RISD for the SWC members.

The reasonable conveyance losses and reasonable on-farm application efficiencies should be computed as follows:

Reasonable Conveyance Loss

The conveyance losses in the SWC systems are knowable, and IDWR has the capability to develop reliable estimates of reasonable conveyance losses for each of the SWC members. Conveyance losses should be determined based on records provided by the Districts, and from interviews of the District managers and staff. Most of the SWC members measure deliveries to the users under their respective systems. Some of the members use these records to compute the conveyance losses in their systems. Even when the SWC members do not explicitly tabulate their losses, they generally have a good understanding of the amount of conveyance losses in their systems based on the difference between what they divert and what they deliver.

The Worstell Method should not be used to compute conveyance losses because (a) it was found to be unreliable by the Hearing Officer during the SWC Delivery Call hearing, and (b) it does not consider non-seepage losses and miscellaneous inflows to the conveyance system.

It is important that the conveyance loss figures used in determining the diversion requirements for the SWC members reflect careful operation of their distribution systems, and do not include avoidable operational spills and other avoidable non-seepage losses. In dry years when the ground water users are required to provide replacement supplies to mitigate potential injury from their pumping, they should not have to provide mitigation water that will be lost to avoidable conveyance losses.

Reasonable On-Farm Application Efficiency

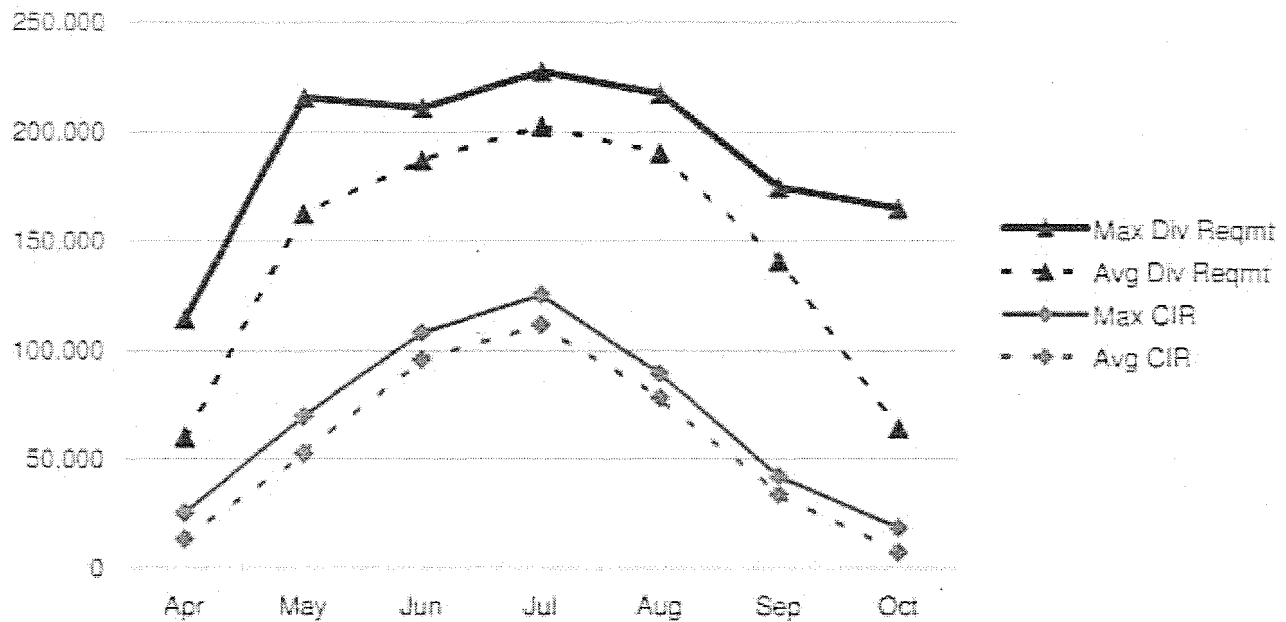
IDWR should determine an area-weighted average annual on-farm irrigation efficiency for each of the SWC members based on the various application methods used in their service areas. These calculations should utilize sprinkler application efficiencies from the

A&B Order, and a gravity application efficiency in the range of 55% to 60% based on the consensus of the Pocatello and SWC experts during the SWC Delivery Call hearing.



Figure 1

Average and Maximum CIR and Diversion Requirements  
Computed Using IDWR Modified Protocol  
Twin Falls Canal Company



Difference Between Average and Maximum CIR and Diversion Requirements  
Twin Falls Canal Company

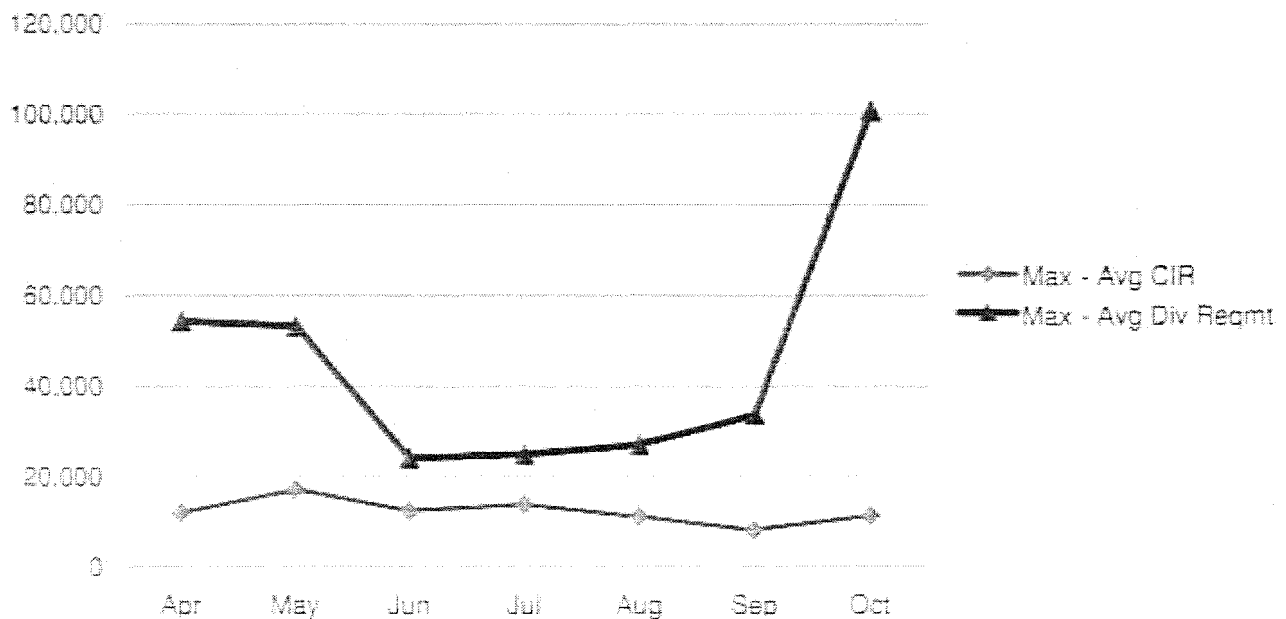


Table 1

**Forecast 2010 Shortages Computed by Various Methods  
Twin Falls Canal Company**

	(10) Using BLY from April 7th Order	(11) Using Proj Effcy From 4/7/2010 Order	(12) Using Reas. Project Efficiency
(1) Assumed Conveyance Loss			12%
(2) Reasonable On-Farm Efficiency			60%
(3) Project Efficiency	n/a	43.6%	53%
<b>Reasonable In-Season Demand (af)</b>			
(4) Irrigated Area (ac)		183,589	183,589
(5) CIR (in)		25.6	25.6
(6) Crop Water Demand (af)	n/a	391,481	391,481
(7) Reasonable In-Season Demand (af)	1,045,382	897,359	738,102
<b>(8) Forecast 2010 Supply (af)</b>			
Natural Flow	747,391		
Storage	241,078		
Forecast 2010 Supply (af)	988,469	988,469	988,469
(9) Forecast Shortage (af)	56,913	0	0

**Notes**

- (1) Assumed conveyance loss for analysis purposes.
- (2) Area-weighted reasonable average on-farm efficiency from Table 3.
- (3) Project efficiency computed as  $(1 - \text{conveyance loss}) (1) \times \text{Reasonable On-Farm Efficiency (2)}$ .
- (4) Irrigated area from Exhibit 4310 Estimate of Non-irrigated acres within the TFCC Service Area, Table 10 [25], SPF - 3/20/07.
- (5) Average annual TFCC CIR from Table 2.
- (6) Crop water demand computed as Irrigated Area (4) x CIR (5).
- (7) RISD computed as Crop Water Demand (6) : Project Efficiency (3).
- (8) Forecast 2010 TFCC water supply from 4/14/2010 IDWR Letter re: Surface Water Coalition Delivery Call.
- (9) Forecast 2010 Supply (8) minus RISD (10).
- (10) Computed shortage reported in 4/14/2010 IDWR Letter using baseline water requirement from April 7th Order FOF 29.
- (11) Computed shortage using average annual Crop Water Requirement and weighted average project efficiency (3) derived from 4/7/2010 IDWR Order.
- (12) Computed shortage using average annual Crop Water Demand (6) and project efficiencies (3) computed from assumed conveyance losses (1) and reasonable on-farm efficiency (2).

Table 2

**Monthly Project Efficiencies  
from April 7, 2010 Final SWC Order**

Month	A&B	AFRD2	BID	Milner	Minidoka	NSCC	TFCC	Avg
Apr	1.08	0.24	0.27	1.36	0.17	0.14	0.22	0.50
May	0.42	0.28	0.31	0.59	0.27	0.28	0.32	0.35
Jun	0.64	0.40	0.48	0.62	0.50	0.44	0.51	0.51
Jul	0.79	0.44	0.56	0.66	0.64	0.49	0.55	0.59
Aug	0.68	0.38	0.42	0.56	0.48	0.39	0.41	0.47
Sep	0.51	0.26	0.32	0.49	0.35	0.30	0.24	0.35
Oct	0.16	0.41	0.11	0.34	0.11	0.22	0.11	0.21

**Note**

- (1) From supporting data for April 7, 2010 IDWR Order; DS & RSD Calculator.xlsx  
Values from table entitled, "Summary of Corrected Average PE Values - 2001:2008.

**Monthly Project Efficiencies**

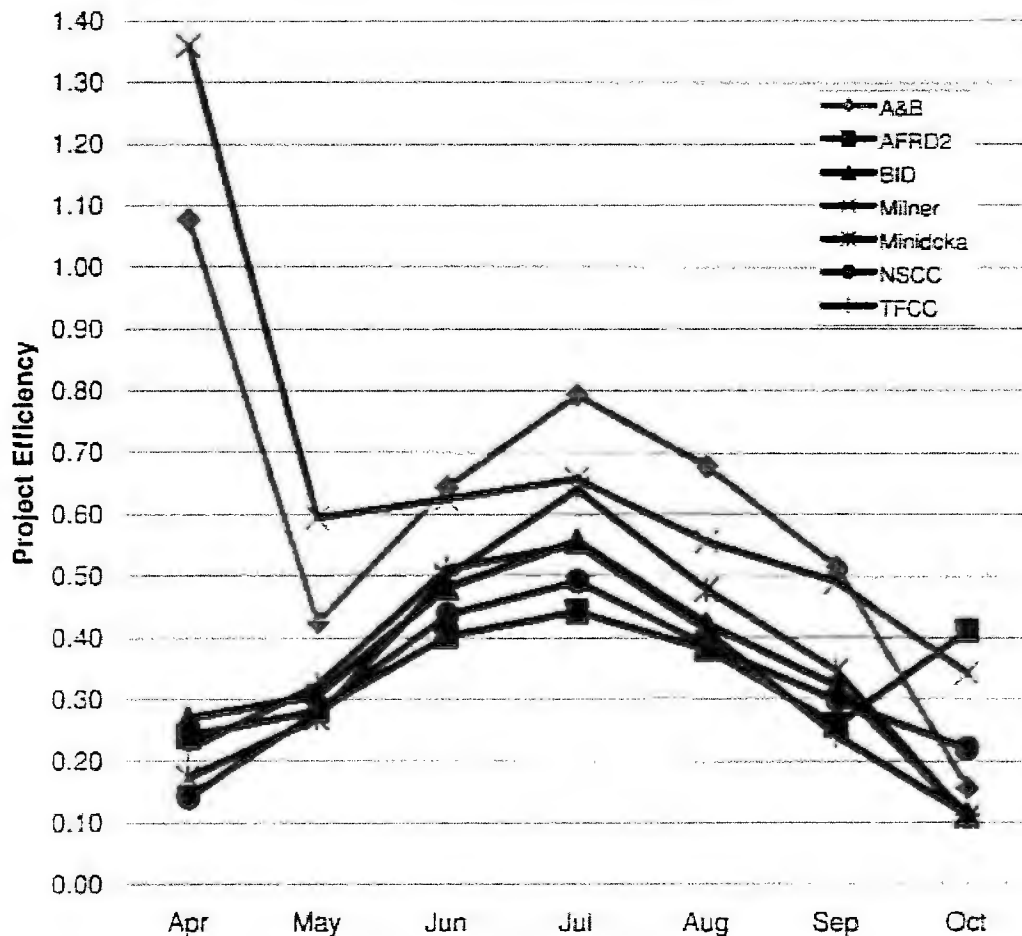


Table 3

### Monthly Crop Irrigation Requirements and Weighted Average Project Efficiency

## (1) Average Monthly Crop Irrigation Requirements (CIR)

Month	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Apr	0.07	0.07	0.10	0.08	0.06	0.06	0.06
May	0.24	0.28	0.30	0.30	0.25	0.27	0.29
Jun	0.53	0.53	0.57	0.55	0.55	0.52	0.53
Jul	0.71	0.65	0.67	0.60	0.72	0.64	0.61
Aug	0.46	0.48	0.41	0.40	0.43	0.48	0.42
Sep	0.21	0.25	0.20	0.18	0.20	0.23	0.18
Oct	0.02	0.05	0.02	0.04	0.02	0.04	0.05
Annual	2.25	2.31	2.27	2.14	2.22	2.25	2.13

## (2) Monthly Project Efficiency

Month	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Apr	108%	24%	27%	136%	17%	14%	22%
May	42%	28%	31%	59%	27%	28%	32%
Jun	64%	40%	48%	62%	50%	44%	51%
Jul	79%	44%	56%	66%	64%	49%	55%
Aug	68%	38%	42%	56%	48%	39%	41%
Sep	51%	26%	32%	49%	35%	30%	24%
Oct	16%	41%	11%	34%	11%	22%	11%
(3) Wtd Avg	67.2%	37.4%	44.4%	62.6%	48.9%	39.5%	43.6%

**Notes**

- (1) Derived from supporting data for April 7, 2010 IDWR Order; DS & Risd Calculator.xlsx.
- (2) From supporting data for April 7, 2010 IDWR Order; DS & Risd Calculator.xlsx.
- (3) Average of monthly project efficiencies weighted by monthly CIR.

Table 4

Weighted Average Annual Reasonable On-Farm Efficiencies  
Surface Water Coalition Members

(1) On-Farm Efficiencies for Sprinklers (from 1/29/2008 A&B Order)

Sprinkler Type	Low	High	Avg
Center Pivot	75.0%	85.0%	80.0%
Wheel or Hand Move	60.0%	75.0%	67.5%
Solid Set	60.0%	85.0%	72.5%
Avg for Non-Center Pivot	60.0%	80.0%	70.0%

(2) On Farm Efficiency for Gravity Irrigation (from 11/7/2007 SWC Rebuttal Report)

	Low	High	Avg
Furrow Irrigation	30.0%	80.0%	55.0%

(3) SWC Irrigated Acres and Application Method (from 9/26/2007 Franzoy Report)

Application Method	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
Center Pivot	4,290	27,939	7,183	5,207	12,057	88,115	29,829
Other Sprinkler	6,395	12,854	28,073	4,927	48,526	48,977	19,221
Gravity	3,952	21,568	12,387	3,200	14,510	16,974	147,111
Total	14,637	62,361	47,643	13,334	75,093	154,066	196,161

(4) Area-Weighted Average Reasonable On-Farm Efficiencies

	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
On-Farm Efficiency	68.9%	69.3%	67.6%	70.3%	68.7%	74.1%	60.3%

Notes

- (1) On-farm efficiencies for sprinklers from 1/29/2008 Order in A&B Delivery Call (p. 12).
- (2) On-farm efficiencies for gravity irrigation from 11/7/2007 SWC Rebuttal Report to Expert Report and Direct Testimony of Gregory Sullivan (p. 3).
- (3) Irrigated area by application method from 9/26/2007 Franzoy Expert Report (Table 5).
- (4) Weighted average reasonable farm irrigation efficiency (weighted by application method).

Table 5

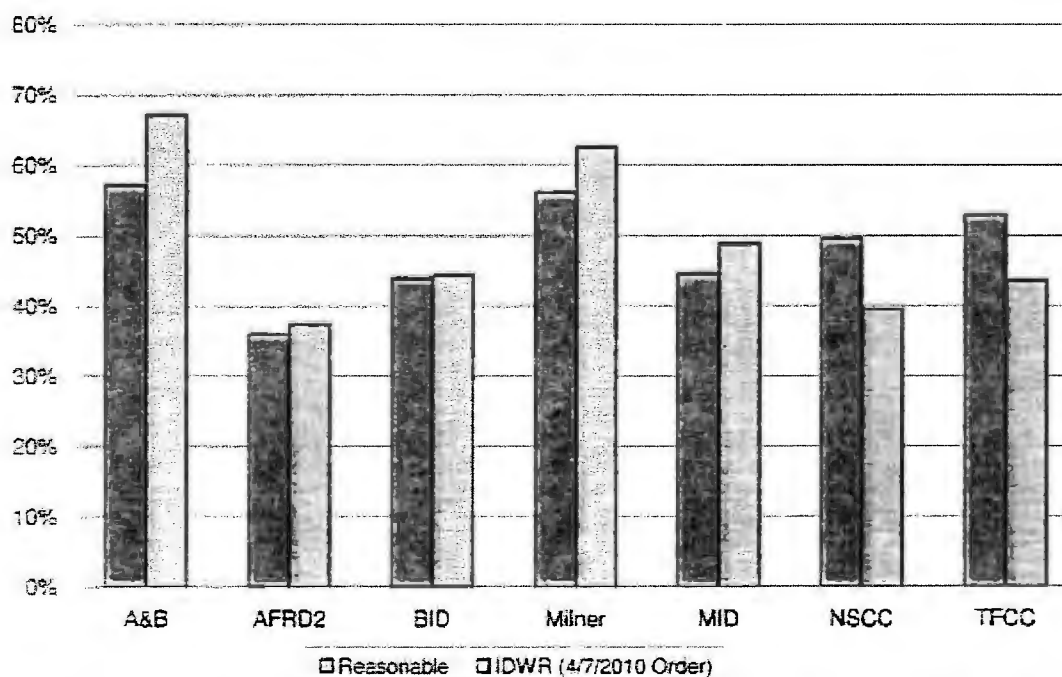
**Reasonable Project Efficiencies Compared to  
Project Efficiencies from 4/7/2010 Final SWC Order**

	A&B	AFRD2	BID	Milner	MID	NSCC	TFCC
(1) Reasonable On-Farm Efficiency	69%	69%	68%	70%	69%	74%	60%
(2) Reported Conveyance Loss	17%	48%	35%	20%	35%	33%	12%
(3) Reasonable Project Efficiency	57.2%	36.0%	43.9%	56.2%	44.7%	49.6%	53.0%
(4) IDWR Project Efficiency (weighted avg)	67.2%	37.4%	44.4%	62.6%	48.9%	39.6%	43.6%
(5) Proposed Administration Project Efficiency	67.2%	37.4%	44.4%	62.6%	48.9%	49.6%	53.0%

**Notes**

- (1) Area-weighted average on-farm efficiency using (a) sprinkler efficiencies from 1/29/2008 A&B Order, (b) gravity efficiency from 11/7/2007 SWC Rebuttal Report, and (c) irrigated area from 9/26/2007 Franzoy Report. See Table 4 for derivation of area-weighted average on-farm efficiency.
- (2) Reported conveyance loss from District records and/or testimony of District managers as described in 9/26/2007 Sprink Water Engineers expert report prepared for the City of Pocatello. These conveyance losses include seepage losses and operational spills.
- (3) Reasonable On-Farm Efficiency (1) x (1 minus Reported Conveyance Loss (2))[decimal].
- (4) CIR-weighted average project efficiency from April 7, 2010 Final SWC Order.
- (5) Greater of (3) or (4).

**Reasonable Project Efficiency vs.  
Weighted Average Project Efficiency from 4/7/2010 Final SWC Order**



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ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

**BEFORE DEPARTMENT OF WATER RESOURCES**

**STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION  
OF WATER TO VARIOUS WATER  
RIGHTS HELD BY OR FOR THE  
BENEFIT OF A&B IRRIGATION  
DISTRICT, AMERICAN FALLS  
RESERVOIR DISTRICT #2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, AND TWIN FALLS  
CANAL COMPANY

Docket No. CM-DC-2010-001

**AFFIDAVIT OF CHARLES BRENDHECKE**

STATE OF COLORADO )  
County of Boulder )  
ss:

I, Charles M. Brendecke, have been first duly sworn under oath and do hereby depose  
and state as follows:

1. I am employed by AMEC, 1002 Walnut, Suite 200, Boulder, Colorado 80302. I am a  
Licensed Professional Engineer in Idaho, Colorado, Wyoming and Texas. I have a

Attachment 4

AFFIDAVIT OF CHARLES BRENDHECKE

1

745

Bachelor of Science degree in Civil Engineering from the University of Colorado, and Master of Science and Doctor of Philosophy Degrees in Civil Engineering from Stanford University. My education and professional experience are set forth in greater detail in the *Affidavit of Charles M. Brendecke* filed with the Department in the Matter of the Surface Water Coalition Delivery Call and is included in my prefiled direct testimony filed both in the Surface Water Coalition and the Blue Lakes and Clear Springs delivery call matters. I have been for the past several years and continue to be the lead engineer and technical consultant to IGWA and its Ground Water District Members.

2. I have reviewed the Idaho Department of Water Resource's ("Department") *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carry-Over* ("Methodology Order"), the Department's letter of April 14<sup>th</sup>, 2010, describing the projected 2010 shortfall to members of the Surface Water Coalition ("April 14<sup>th</sup> letter"), and the Department's *Order Regarding April 2010 Forecast Supply Methodology Steps 3 and 4* ("As-Applied Order") and am familiar with their contents. I have also received information provided by the Department on the data and calculations allegedly underlying these Orders, however, that information is incomplete and I cannot draw complete conclusions therefrom.
3. The As-Applied Order predicts a 2010 irrigation season water supply shortfall to American Falls Reservoir District #2 ("AFRD#2") of 27,400 acre-feet and to Twin Falls Canal Company ("TFCC") of 56,900 acre-feet. The As-Applied Order requires junior groundwater users to secure the entire amount of these predicted shortfalls, or 84,300 acre-feet, by May 13, 2010, to avoid curtailment.



4. The Department has used the Eastern Snake Plain Aquifer Model ("ESPAM") to calculate the extent of curtailment of junior groundwater irrigation use necessary to generate a volume of water equal to the predicted shortfall of 84,300 acre-feet in the near-Blackfoot to Minidoka reach of the Snake River from which members of the Surface Water Coalition ("SWC") divert water into their canal systems. The Department's modeling calculation determined that curtailment to a priority date of April 5, 1982, would generate, over time, increased reach gains of 84,361 acre-feet to the near-Blackfoot to Minidoka reach.
5. Some of the groundwater irrigation rights that would be curtailed using the April 5, 1982, priority date are outside the area of common groundwater supply defined in IDAPA 37.03.11.050.01, though they lie within the domain of the ESPAM. The Department has determined that April 5, 1982, curtailment applied only within the area of common groundwater supply would generate a volume of 77,985 acre-feet to the near-Blackfoot to Minidoka reach. Nevertheless, the 2010 Order requires junior groundwater users to provide mitigation in the amount of 84,300 acre-feet, an amount approximately 6,300 acre-feet greater than could be provided by authorized curtailment.
6. Exhibit A contains modeling results for the April 5, 1982, curtailment distributed by the Department. The results are shown for each Ground Water District being asked to provide mitigation. The sum of reach gains produced by curtailment in each of the Districts is 70,009 acre-feet. Nevertheless, the As-Applied Order requires junior groundwater users to provide mitigation in the amount of 84,300 acre-feet, an amount approximately 14,300 acre-feet greater than could be provided by curtailment within the Districts.

7. Based on my experience using the ESPAM and on modeling results prepared by the Department for previous orders in connection with the delivery call by the Surface Water Coalition, it is my opinion that less than 25% of the increase in reach gain that is predicted to occur from the proposed curtailment would be available for diversion by AFRD#2 and TFCC within the 2010 irrigation season. If 25% of the predicted reach gain increase were to occur within the irrigation season, the curtailment would make available approximately 20,000 acre-feet of natural flow to members of the SWC, which includes AFRD#2 and TFCC. Nevertheless, the As-Applied Order requires junior groundwater users to provide mitigation in the amount of 84,300 acre-feet, an amount approximately 64,300 acre-feet greater than would actually be made available by the curtailment.
8. The shortfall calculated in the As-Applied Order is determined without regard to the impacts of groundwater use on the water supplies of AFRD#2 and TFCC. The calculation relies solely on historical diversion records of the SWC entities and predictions of natural runoff contained in the Joint Forecast prepared by the Bureau of Reclamation and the Corps of Engineers. Depletions of Snake River flows resulting from consumption of hydraulically-connected groundwater are not used in the calculation of shortfall.
9. The shortfall calculated in the As-Applied Order does not appear to consider the beneficial effects to the water supplies of the SWC entities afforded by other, ongoing mitigation activities of groundwater users. These ongoing activities include CREP, conversions of land from groundwater to surface water supply, and managed recharge. Nor does the As-Applied Order appear to consider the beneficial effects to the water

supplies of the SWC entities resulting from extensive managed recharge undertaken in 2009 by the Idaho Water Resource Board and cooperating entities.

10. The natural flow supplies for the SWC entities derive from natural Snake River flows passing Blackfoot and from reach gains to the Snake River in the near-Blackfoot to Minidoka reach. In average and drier years there is little or no natural flow passing Blackfoot except at the peak of runoff because it is all diverted by more senior water rights above Blackfoot. At such times, only the reach gains below Blackfoot contribute natural flow to the river and to the head-gates of the SWC entities. Groundwater pumping can affect these reach gains, but cannot materially affect the natural flow passing Blackfoot during peak runoff.
11. **Exhibit B** (Hearing Exhibit 4118) shows the average monthly reach gains between Blackfoot and Neeley (these are approximately 95% of the gains to the near-Blackfoot to Minidoka reach) for the period 1912-1948 prior to the advent of groundwater development on the Eastern Snake River Plain. The peak monthly reach gain in this period averaged approximately 2,725 cubic feet per second.
12. **Exhibit C** (Hearing Exhibit 4119) shows the cumulative natural flow rights of the SWC entities. **Exhibit C** indicates that the October 11, 1900, natural flow rights of TFCC and North Side Canal Company (totaling 3,400 cfs) are sufficient to command the entire reach gain below Blackfoot. The natural flow below Blackfoot would have to be in excess of 11,000 cfs before the March 30, 1921, natural flow right of AFRD#2 would yield water.
13. **Exhibit D** (Hearing Exhibit 4161) is a planning report prepared at the time of construction of ARFD#2, then known as the "Gooding Project" or the "Gravity Extension

Division.” In **Exhibit D** the authors describe (p. 25) that the project users should expect that, due to its junior natural flow priority, the project would have no natural flow in dry years and that the entire water supply of the project would be derived from storage.

14. The Joint Forecast for 2010 is for an April-July natural flow at Heise of 1.94 million acre-feet. This forecasted flow is in the bottom 7% of recorded years for April-July natural flow at Heise for the period 1911-2009. **Exhibit E** compares the 2010 Joint Forecast to the historical April-July natural flows at Heise for the period 1911-2009. Notably, the 2010 forecast is for lower natural flow than occurred in the years 1919 and 1924 cited by the authors of **Exhibit D** as years when AFRD#2 would have received little or no natural flow. Based on the foregoing facts it is my opinion that AFRD#2 would obtain no yield from its natural flow rights in 2010 regardless of the presence or absence of groundwater pumping.
15. The As-Applied Order calculates a shortfall to AFRD#2 of 27,400 acre-feet. This is predicted to occur despite the fact that the entire storage space owned by AFRD#2 (393,550 acre-feet in American Falls Reservoir) is projected to fill. The As-Applied Order essentially requires junior groundwater users to provide natural flow to AFRD#2 under conditions in which it was never expected to have natural flow and in which its water supply is unaffected by groundwater pumping.
16. The As-Applied Order calculates the shortfall to AFRD#2 and TFCC by subtracting their respective Baseline Demands (essentially historical diversions) from their predicted total supply. In this calculation the predicted total supply is net of the evaporation allocation that is assigned to storage water users in the Water District 1 water right accounting procedure. The evaporation allocation is essentially a “set aside” taken from each storage


account to cover the evaporative losses from reservoirs. Because this allocation is subtracted from the full storage account contents before determining shortfall, the methodology in the As-Applied Order essentially causes groundwater users to mitigate for the evaporation allocation. Groundwater use does not effect reservoir evaporation, and the methodology should consider the full storage account volume in the calculation of total supply available to AFRD#2 and TFCC.

Further, your Affiant saith not.

Dated: May 6, 2010.

  
CHARLES M. BREDECKE

Subscribed to and sworn to before me, a Notary Public, this 6<sup>th</sup> day of May, 2010.

  
Notary Public for State of Colorado  
Residing at 7988 Marshall St., Arvada  
My commission expires 12/2/2012

### CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2010, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated:

Gary Spackman, Interim Director Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 Fax: 208-287-6700 <a href="mailto:gary.spackman@idwr.idaho.gov">gary.spackman@idwr.idaho.gov</a> <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:chris.bromley@idwr.idaho.gov">chris.bromley@idwr.idaho.gov</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
C. Tom Arkoosh Arkoosh Law Offices, Chtd. 301 Main Street; P.O. Box 32 Gooding, ID 83330 <a href="mailto:tarkoosh@capitollawgroup.net">tarkoosh@capitollawgroup.net</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, Idaho 83318-0248 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
John A. Rosholt John K. Simpson Travis L. Thompson Barker, Rosholt & Simpson 113 Main Avenue W., Ste 303 Twin Falls, ID 83301-6167 <a href="mailto:jar@idahowaters.com">jar@idahowaters.com</a> <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a> <a href="mailto:tlr@idahowaters.com">tlr@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

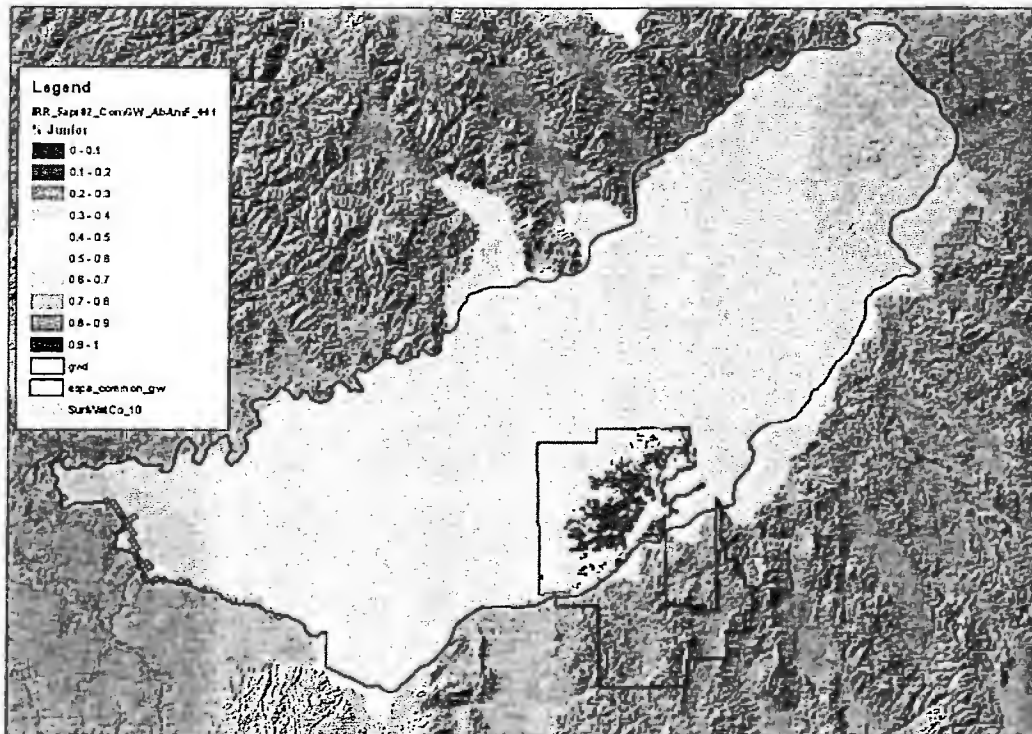
Kathleen Marion Carr U.S. Department of the Interior 960 Broadway, Ste 400 Boise, Idaho 83706 <a href="mailto:kathleenmarion.carr@sol.joi.gov">kathleenmarion.carr@sol.joi.gov</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Dept of Justice 1961 Stout St., 8 <sup>th</sup> Floor Denver, CO 80294 <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email
Matt J. Howard U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234 <a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Sarah H. Klahn Mitra Pemberton White & Jankowski 511 16 <sup>th</sup> Street, Ste 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Email
Michael C. Creamer Jeffrey C. Fereday Givens Pursley P.O. Box 2720 Boise, Idaho 83701-2720 <a href="mailto:mcc@givenspursley.com">mcc@givenspursley.com</a> <a href="mailto:jcf@givenspurslev.com">jcf@givenspurslev.com</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, Idaho 83205 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email

*Candace Myer*

# **EXHIBIT A**



10% clip for nr Blackfoot-Minidoka, common groundwater, Abredeen-AmF GW Dist  
4/5/1982

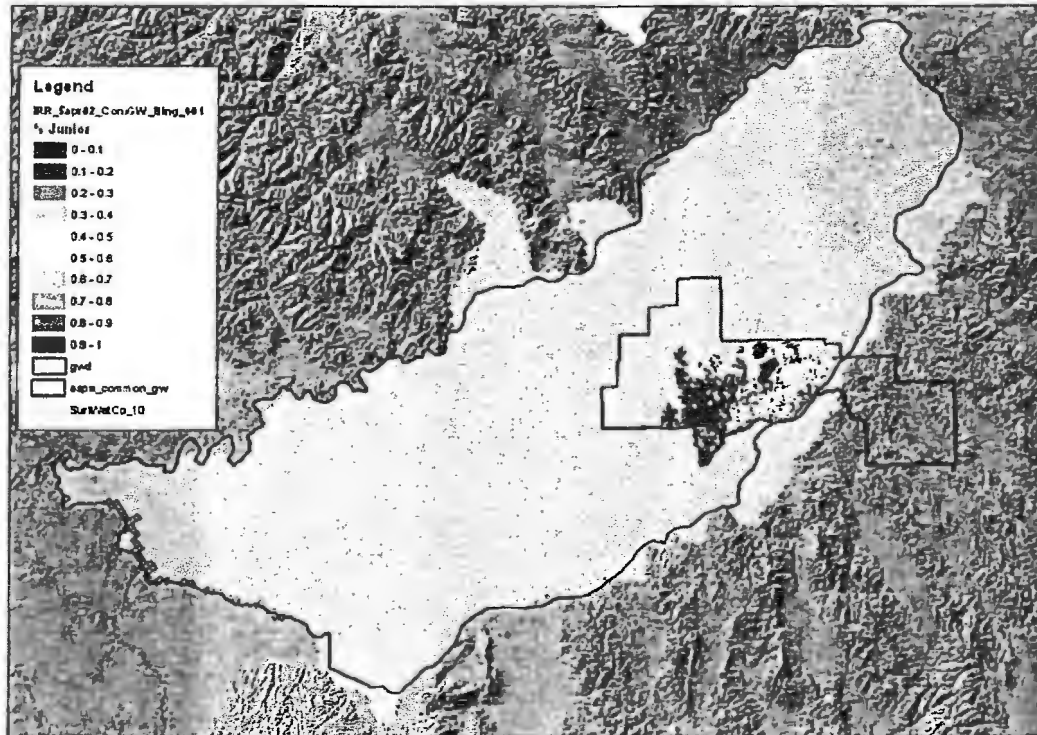


irr_area		Depletions		ft/ac/yr
79,906,681	m <sup>2</sup>	4,709,472	ft <sup>3</sup> /d	2.000
19,745	ac	39,489	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	955.1227	0.0	8
MLD	25003.57	0.3	210
KSP-MLD	2902.067	0.0	24
KSP	26388.43	0.3	221
BUL-KSP	41619.3	0.5	349
DWB-BUL	108011.3	1.3	906
A-R	70509.69	0.8	591
H-S	83873.1	1.0	703
S-B	698985.4	8.1	5,861
N-M	562673.8	6.5	4,718
B-N	3088550	35.7	25,897
Sum	4,709,472	55	39,489

Sum of N-M, B-N  
30,615

10% clip for nr Blackfoot-Minidoka, common groundwater, Bingham GW Dist  
4/5/1982

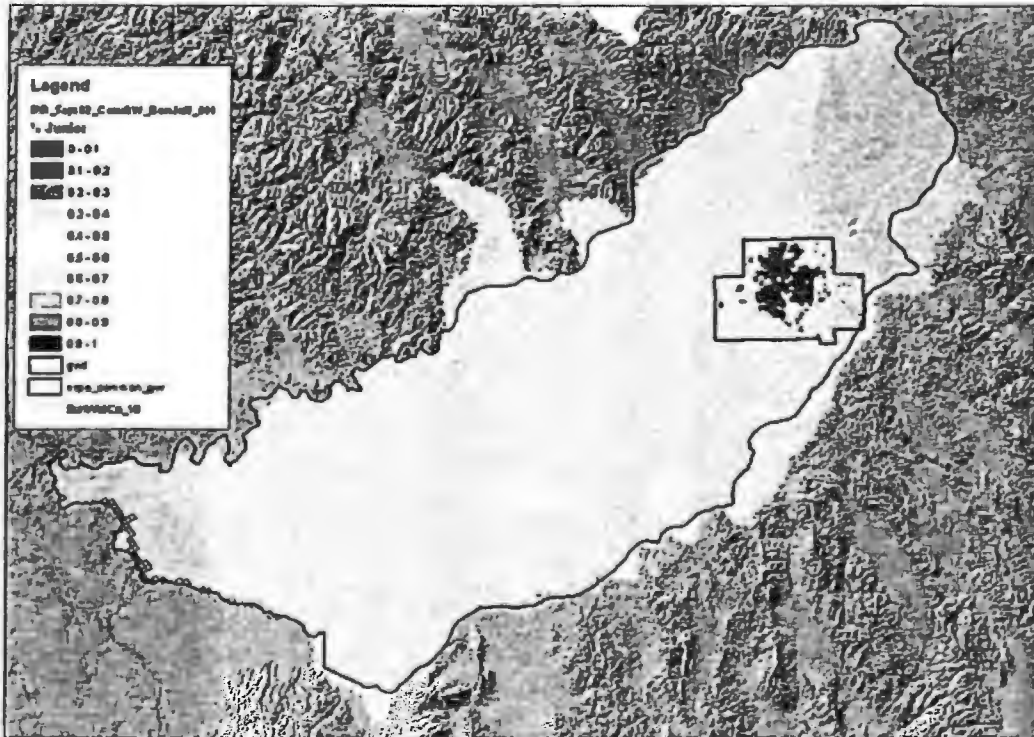


irr_area		Depletions		ft/ac/yr
38,475,906	m <sup>2</sup>	2,300,032	ft <sup>3</sup> /d	2.028
9,508	ac	19,286	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	248.7915	0.0	2
MLD	6512.844	0.1	55
KSP-MLD	755.7859	0.0	6
KSP	6871.536	0.1	58
BUL-KSP	10836.78	0.1	91
DWB-BUL	28107.62	0.3	236
A-R	68852.03	0.8	577
H-S	85958.44	1.0	721
S-B	809917	9.4	6,791
N-M	28605.4	0.3	240
B-N	1253366	14.5	10,509
Sum	2,300,032	27	19,286

Sum of N-M, B-N  
10,749

10% clip for nr Blackfoot-Minidoka, common groundwater, Bonnaville-Jefferson GW Dist  
4/5/1982

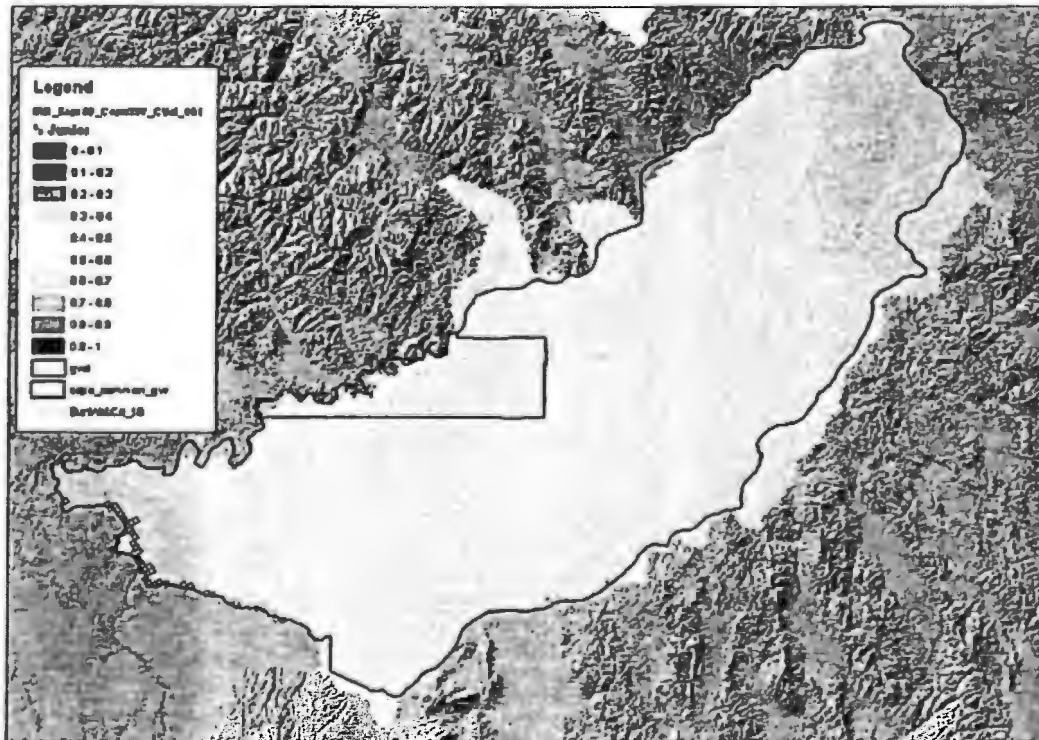


irr_area		Depletions		ft/ac/yr
20,745,193	m <sup>2</sup>	1,076,500	ft <sup>3</sup> /d	1.761
5,126	ac	9,026	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	106.8209	0.0	1
MLD	2796.347	0.0	23
KSP-MLD	324.5014	0.0	3
KSP	2950.325	0.0	25
BUL-KSP	4652.808	0.1	39
DWB-BUL	12067.87	0.1	101
A-R	85114.46	1.0	714
H-S	130535.1	1.5	1,095
S-B	343724	4.0	2,882
N-M	11715.27	0.1	98
B-N	482512.3	5.6	4,046
Sum	1,076,500	12	9,026

Sum of N-M, B-N  
4,144

10% clip for nr Blackfoot-Minidoka, common groundwater, Cary Valley GW Dist  
4/5/1982



irr_area		Depletions		ft/ac/yr
2,713,985	m <sup>2</sup>	143,310	ft <sup>3</sup> /d	1.792
671	ac	1,202	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	249.5694	0.0	2
MLD	6529.152	0.1	55
KSP-MLD	753.8112	0.0	6
KSP	6831.15	0.1	57
BUL-KSP	10750.54	0.1	90
DWB-BUL	27606.8	0.3	231
A-R	1953.241	0.0	16
H-S	2228.729	0.0	19
S-B	16406.17	0.2	138
N-M	13643.23	0.2	114
B-N	56357.81	0.7	473
Sum	143,310	2	1,202

Sum of N-M, B-N  
587

10% clip for nr Blackfoot-Minidoka, common groundwater, Goose Cr Irr Dist  
4/5/1982

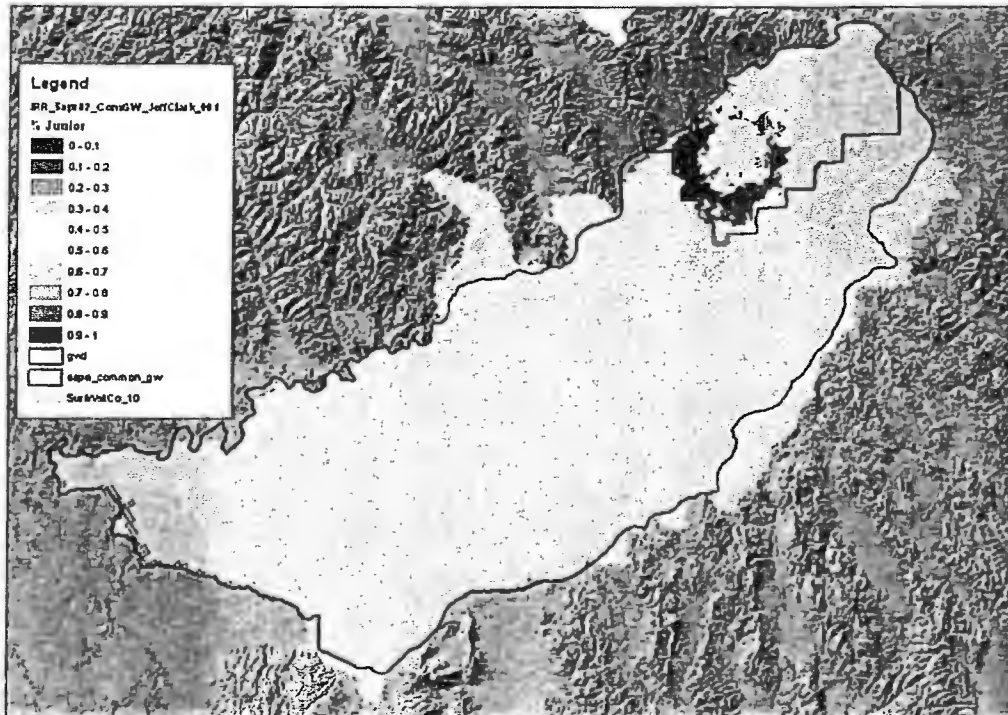


irr_area		Depletions		ft/ac/yr
4,384,295	m <sup>2</sup>	284,432	ft <sup>3</sup> /d	2.201
1,083	ac	2,385	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	484.5288	0.0	4
MLD	12719.01	0.1	107
KSP-MLD	1517.136	0.0	13
KSP	14041.33	0.2	118
BUL-KSP	22411.65	0.3	188
DWB-BUL	63328.45	0.7	531
A-R	3112.672	0.0	26
H-S	3570.822	0.0	30
S-B	26660.6	0.3	224
N-M	43010.16	0.5	361
B-N	93575.27	1.1	785
Sum	284,432	3	2,385

Sum of N-M, B-N  
1,145

10% clip for nr Blackfoot-Minidoka, common groundwater, Jefferson-Clark GW Dist  
4/5/1982



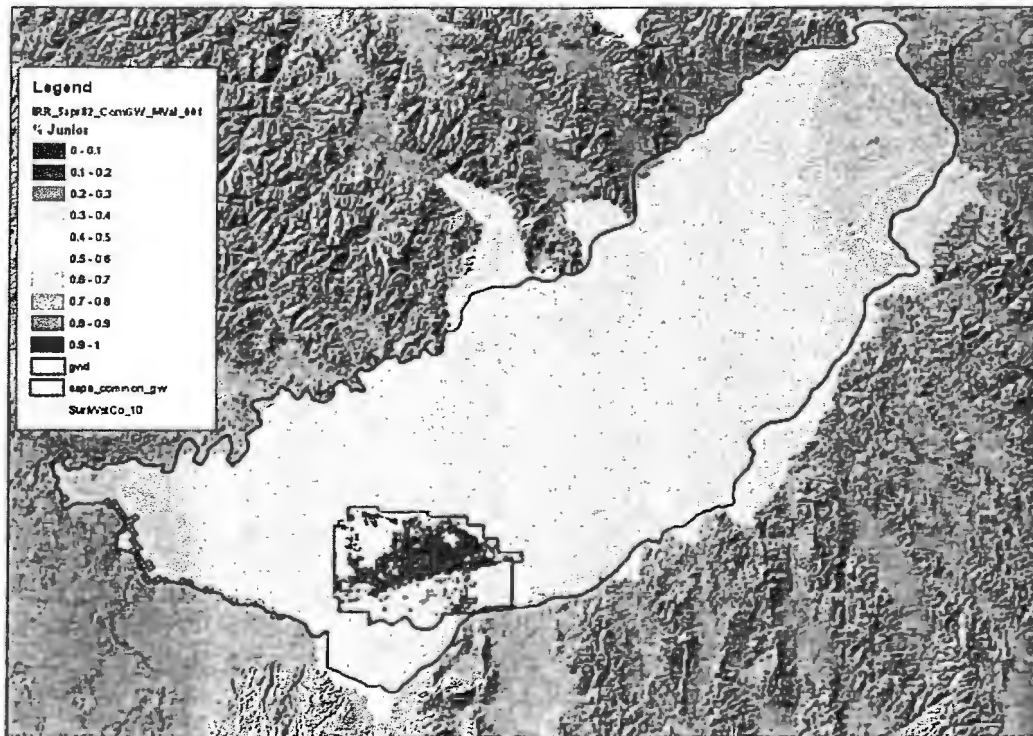
irr_area		Depletions		ft/ac/yr
52,006,307	m <sup>2</sup>	3,032,398	ft <sup>3</sup> /d	1.979
12,851	ac	25,427	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	162.4972	0.0	1
MLD	4253.834	0.0	36
KSP-MLD	493.6335	0.0	4
KSP	4488.042	0.1	38
BUL-KSP	7077.855	0.1	59
DWB-BUL	18357.46	0.2	154
A-R	1272904	14.7	10,673
H-S	569638.7	6.6	4,776
S-B	445640.6	5.2	3,737
N-M	17370.4	0.2	146
B-N	692010.8	8.0	5,802
Sum	3,032,398	35	25,427

Sum of N-M, B-N  
5,948



10% clip for nr Blackfoot-Minidoka, common groundwater, Magic Valley GW Dist  
4/5/1982

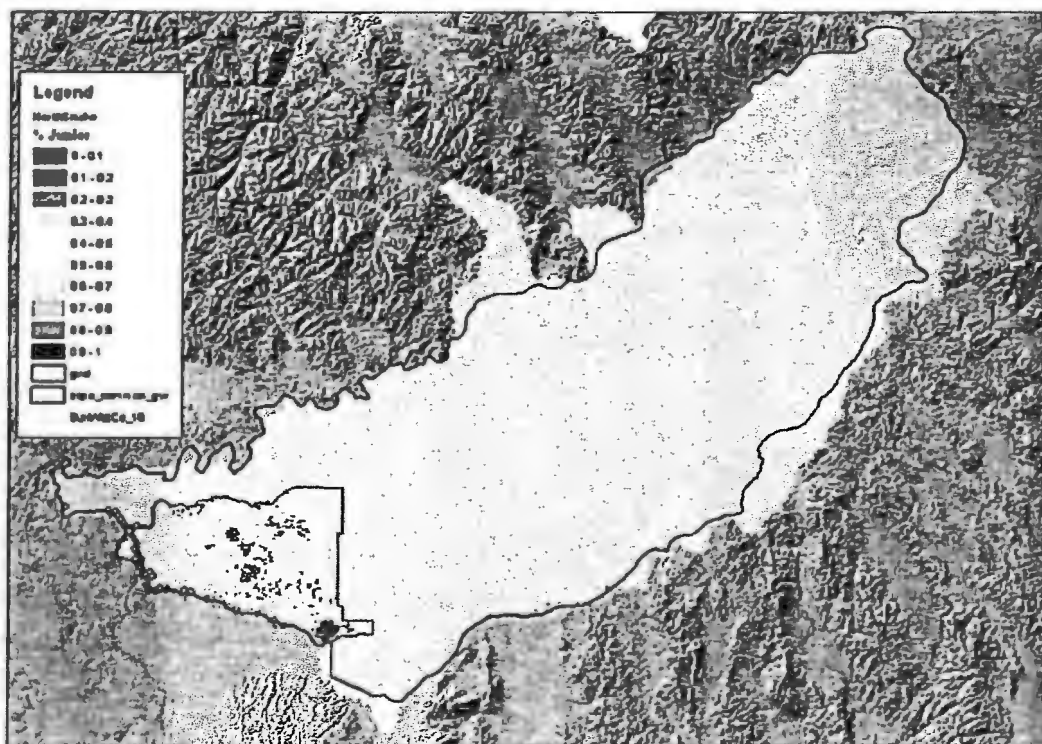


irr_area		Depletions	ft/ac/yr
41,507,530	m <sup>2</sup>	2,717,436	ft <sup>3</sup> /d
10,257	ac	22,786	ac-ft/y

reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	4802.968	0.1	40
MLD	125927.8	1.5	1,056
KSP-MLD	14840.09	0.2	124
KSP	136285.1	1.6	1,143
BUL-KSP	216390.2	2.5	1,814
DWB-BUL	587672.2	6.8	4,928
A-R	32102.06	0.4	269
H-S	36819.15	0.4	309
S-B	274708.2	3.2	2,303
N-M	326371.6	3.8	2,737
B-N	961516.7	11.1	8,062
Sum	2,717,436	31	22,786

Sum of N-M, B-N  
10,799

10% clip for nr Blackfoot-Minidoka, common groundwater, Nsnake GW Dist  
4/5/1982



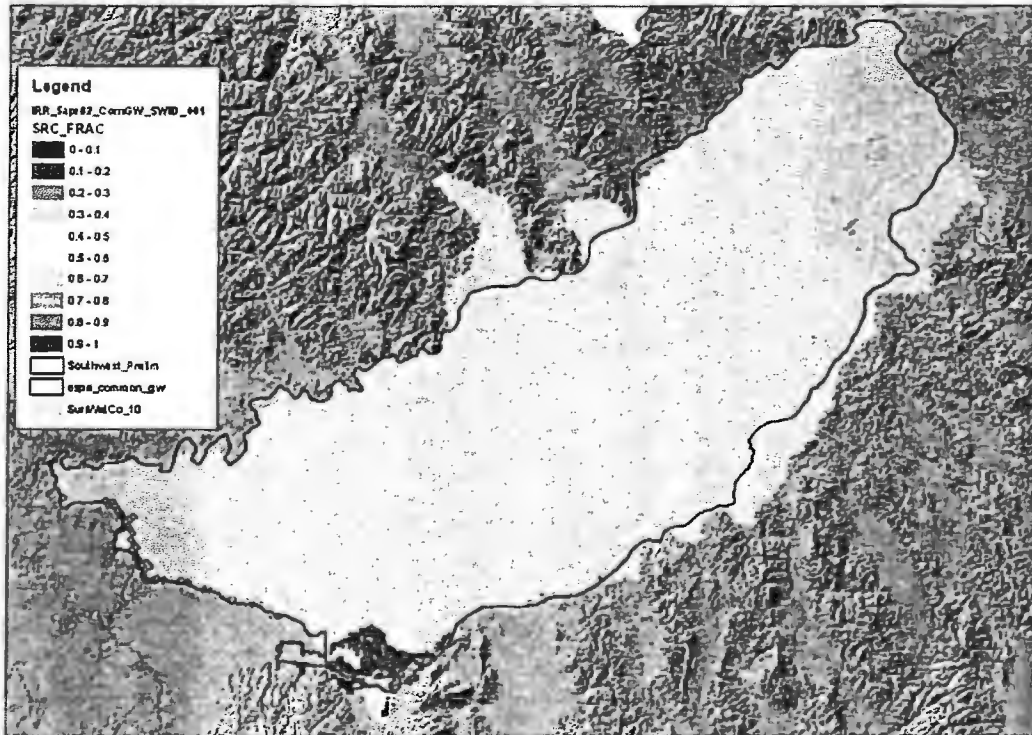
lrr_area		Depletions		ft/ac/yr
9,747,210	m <sup>2</sup>	669,114	ft <sup>3</sup> /d	2.329
2,409	ac	5,610	ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	1718.146	0.0	14
MLD	45669.75	0.5	383
KSP-MLD	5974.035	0.1	50
KSP	58300.59	0.7	489
BUL-KSP	96049.35	1.1	805
DWB-BUL	270430.3	3.1	2,268
A-R	3933.309	0.0	33
H-S	4509.434	0.1	38
S-B	33601.04	0.4	282
N-M	31871.76	0.4	267
B-N	117056.6	1.4	982
Sum	669,114	8	5,610

Sum of N-M, B-N  
1,249



10% clip for nr Blackfoot-Minidoka, common groundwater, SWID Dist  
4/5/1982



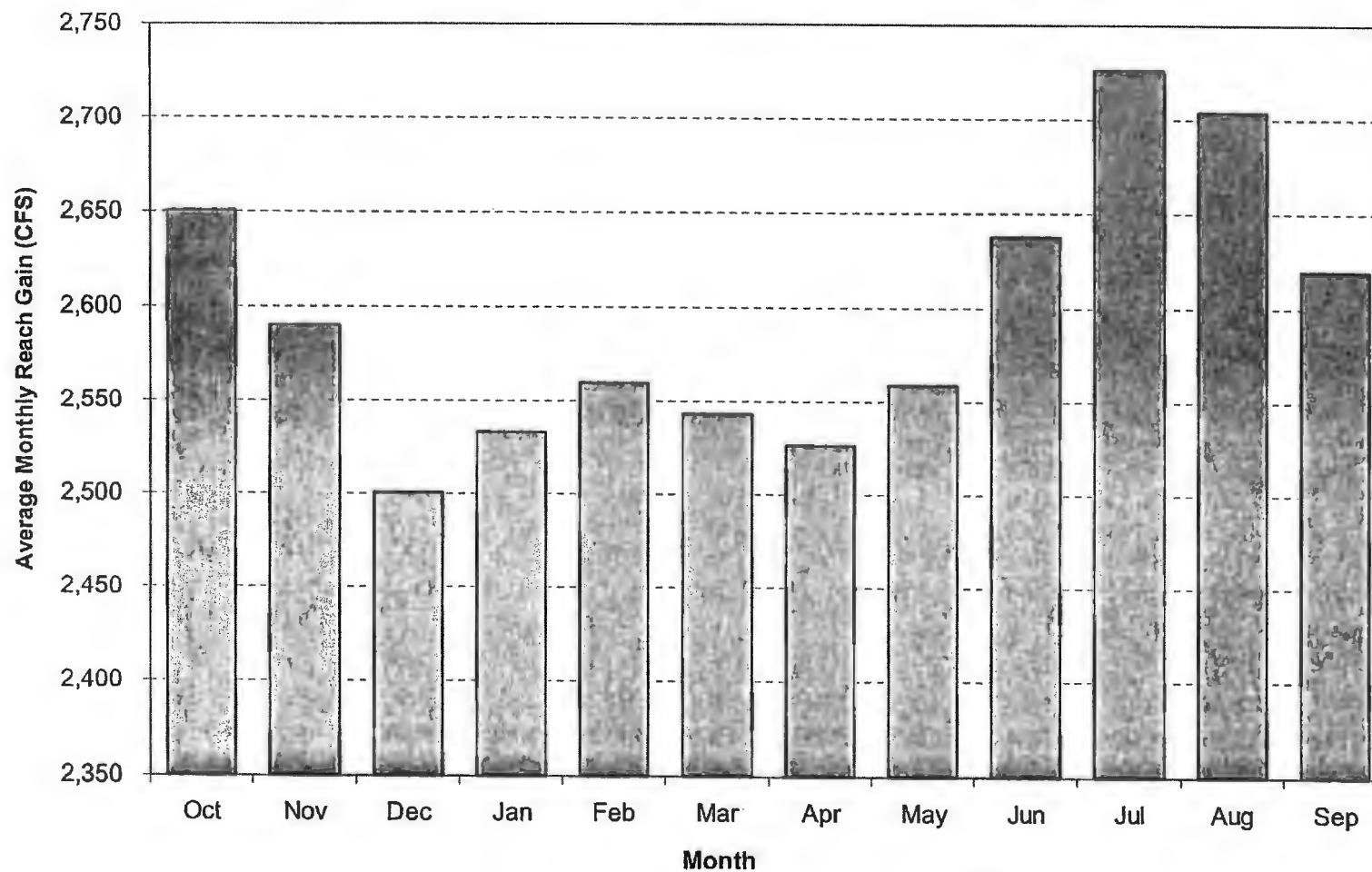
irr_area		Depletions	ft/ac/yr
19,689,640 m <sup>2</sup>		1,275,481 ft <sup>3</sup> /d	2.198
4,865 ac		10,695 ac-ft/y	

Reach	cf/d gain	cfs gain	ac-ft/y
MLD-BAN	2261.333	0.0	19
MLD	59426.64	0.7	498
KSP-MLD	7166.045	0.1	60
KSP	66777.32	0.8	560
BUL-KSP	107067.9	1.2	898
DWB-BUL	311960.8	3.6	2,616
A-R	13378.77	0.2	112
H-S	15346.9	0.2	129
S-B	114557.9	1.3	961
N-M	175791.3	2.0	1,474
B-N	401745.8	4.6	3,369
Sum	1,275,481	15	10,695

Sum of N-M, B-N  
4,843

## **EXHIBIT B**

Blackfoot to Neeley Average Monthly Reach Gains, 1912 - 1948



Updated to include recent data

Source: USGS, 1938

IDWR, 2005: "blackfoot\_neeley\_gains.xls"

<ftp://ftp.state.id.us/IDWR/Outgoing/SWCoalition/>



December, 2005

Exhibit 4118

Monthly Average Reach Gains, Blackfoot to Neeley, 1912 - 1948

# EXHIBIT C

**Surface Water Coalition Natural Flow Water Rights (1,2)**  
**Sorted by Priority Date**

<u>Canal/District</u>	<u>Amount(cfs)</u>	<u>Priority Date</u>	<u>Cumulative Amount (cfs)</u>
North Side Canal Company	400	10 11 1900	400
Twin Falls Canal Company	3000	10 11 1900	3400
Minidoka Irrigation District(3)	1726	3 26 1903	5126
North Side Canal Company	2250	10 7 1905	7376
North Side Canal Company	350	6 16 1908	7726
Minidoka Irrigation District(3)	1000	8 6 1908	8726
Twin Falls Canal Company	600	12 22 1915	9326
North Side Canal Company	300	12 23 1915	9626
Milner Irrigation District	135	11 14 1916	9761
North Side Canal Company	1260	8 6 1920	11021
Am. Falls Res District #2	850	3 30 1921	11871
Am. Falls Res District #2	1700	4 1 1921	13571
Minidoka Irrigation District(3)	430	4 1 1939	14001
A&B Irrigation District	267	4 1 1939	14268
Milner Irrigation District	121	4 1 1939	14389
Twin Falls Canal Company	180	4 1 1939	14569
Milner Irrigation District	37	10 25 1939	14606

Notes: (1) For irrigation use

(2) From May 2 Order, District 01

(3) Water rights shared with Burley Irrigation District



December, 2005

Exhibit 4119

**Surface Water Coalition (SWC) Natural Flow Water Rights**  
**Sorted by Priority Date**

# EXHIBIT D

Copy National Archives-Rocky Mountain Region

040.

WINDPARK  
GOLDEN  
VALLEY DIST

DEPARTMENT OF THE INTERIOR  
BUREAU OF RECLAMATION.

REPORTS ON THE  
GOODING IRRIGATION PROJECT  
IDAHO.

ENGINEERING REPORT BY  
HOMER J. GAULT,  
ENGINEER, U.S.B.R.

AGRICULTURAL AND ECONOMIC  
REPORT BY  
T.H. MORRELL  
and  
R.B. GREENWOOD.

Denver, Colorado.  
November 25, 1925.

Aug 30



COPY: National Archives-Norfolk Mountain Region

DEPARTMENT OF THE INTERIOR  
BUREAU OF RECLAMATION  
WILDA BUILDING, 1441 WELTON ST.  
Denver, Colo.

November 25, 1925.

From Homer J. Gault, Engineer  
To Chief Engineer, Denver, Colo.  
Subject: Transmitting Report on Gooding Project, Idaho.

1. In compliance with your instructions by letters dated July 8, 17, and 22, 1925, an engineering investigation has been made of the proposed Gooding irrigation project in Idaho, and the report, which has just been completed, is respectfully submitted herewith.

2. Limitations of time and funds have made this work necessarily of a preliminary nature, but the results are thought to be sufficiently accurate for present purposes. Such subjects as properly belong in the Economics report are either omitted or here discussed very briefly.

Homer J. Gault,  
Engineer, U.S.B.R.

Enc.



I N D E X

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DRAWINGS

Map of Snake River Basin, Idaho.

- 196-D-10, General map of project
- 196-D-11, Profile main canal (part).
- 196-D-9, Headgate structure.
- 196-D-7, Turnout structure.
- 196-D-8, Little Wood River Crossing
- 196-D-3, Big Wood River Crossing

# WATER SUPPLY

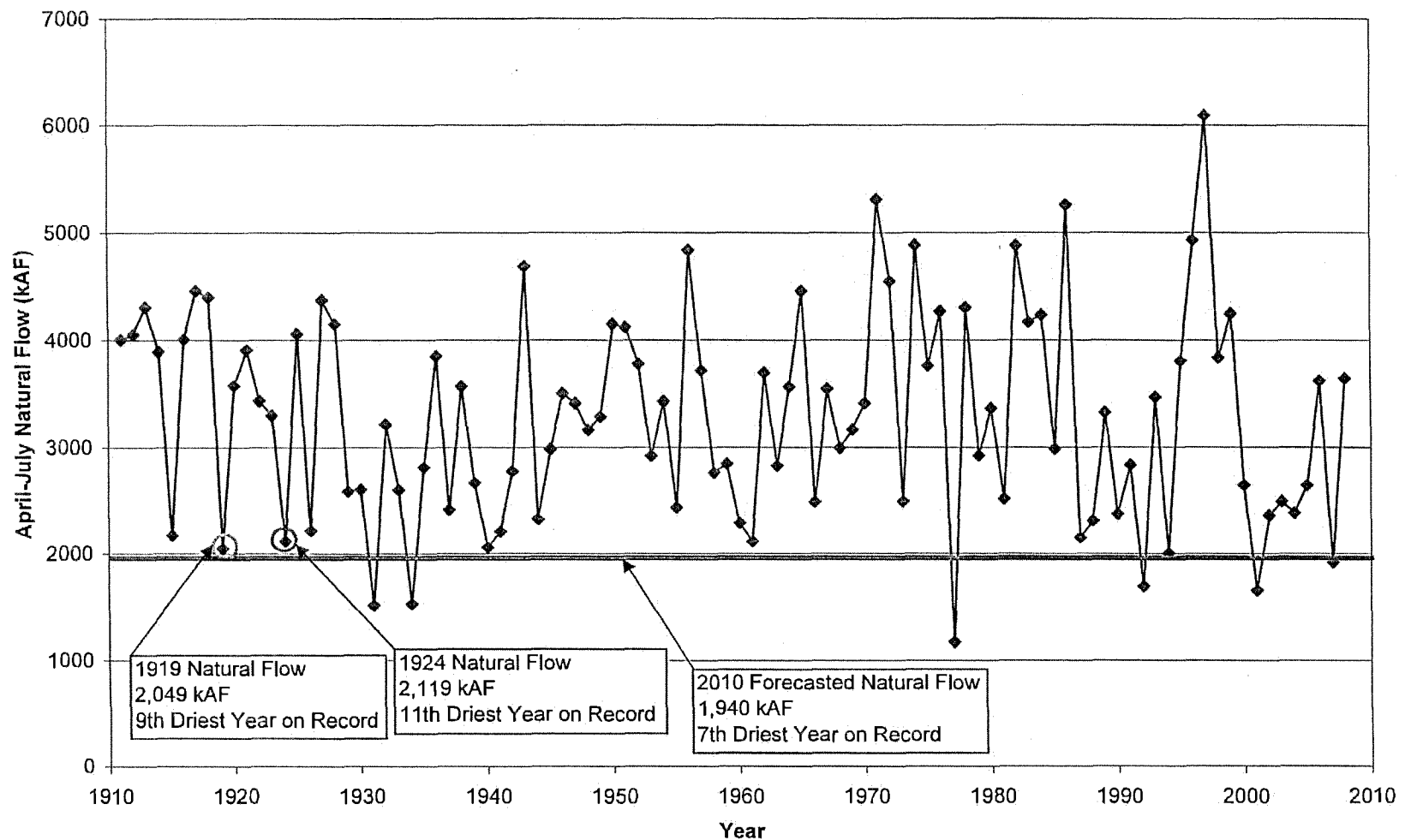
31. The water supply for this project from Snake River is made possible only by the building of the American Falls Reservoir. Estimated annual requirements are given in Table No. 2, under paragraph 29. The requirements for initiated rights from Snake River, including the Minidoka Extension, will exceed the natural flow in occasional years like 1902, 1905 and 1924. In some other years, such as 1919, a small amount of natural flow would be available, while in a few years fully half of the Gooding project requirements would be available from natural flow.

32. In the case of the Minidoka Extension project 525,000 acre-feet of storage in American Falls Reservoir is being held for an area of 115,000 acres. If the same ratio of storage to area were adopted for the Gooding project it would take 880,000 acre-feet. Considering that the Gooding natural flow right would be junior to that of the Minidoka Extension, it is estimated for the purpose of this report that the entire annual diversion requirement of 401,733 acre-feet is to be derived from storage. This at \$5.00 per acre-foot amounts to \$2,008,665, for storage rights.

# **EXHIBIT E**



Comparison of 2010 Forecasted and Historical Heise Natural Flow



9224

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO VARIOUS WATER RIGHTS HELD BY OR FOR )  
THE BENEFIT OF A&B IRRIGATION DISTRICT, )  
AMERICAN FALLS RESERVOIR DISTRICT #2, ) **NOTICE OF HEARING**  
BURLEY IRRIGATION DISTRICT, MILNER ) **REGARDING 2008 DATA**  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )  
DISTRICT, NORTH SIDE CANAL COMPANY, )  
AND TWIN FALLS CANAL COMPANY )  
\_\_\_\_\_)

On April 7, 2010, the Director of the Department of Water Resources ("Director" or "Department") issued his *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order"). The City of Pocatello ("Pocatello"), the Idaho Ground Water Appropriators, Inc. ("IGWA"), and the Surface Water Coalition filed petitions for reconsideration regarding the Methodology Order. One issue raised by IGWA and Pocatello was the Director's use, in the Methodology Order, of information that is not contained in the record before the district court, namely 2008 data. On page 7, footnote 4, of the Methodology Order, the Director specifically directed the parties to the Director's use of 2008 data.

Idaho Code § 67-5251(4) states as follows:

Official notice may be taken of:

- (a) any facts that could be judicially noticed in the courts of this state; and
- (b) generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source thereof, including any staff memoranda and data. Notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed. When the presiding officer proposes to notice staff memoranda or reports, a responsible staff member shall be made available for cross-examination if any party so requests.

See also IDAPA 37.01.01.602.

On April 21, 2010, the Director provided the parties with background technical information regarding the Methodology Order. This information contained 2008 data. The 2008 data used by the Director in the Methodology Order was used in order to update data already contained in the record before the district court. The 2008 data is the type of data described in Idaho Code § 67-5251(4).

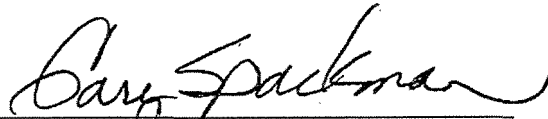
Based upon the concerns raised by the parties, the Director shall conduct a limited hearing to provide the parties the opportunity to contest or rebut the 2008 data.

### ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Director shall conduct a limited hearing to provide the parties the opportunity to contest or rebut the 2008 data. The hearing shall commence on May 24, 2010, starting at 9:00 a.m., at the Department's State Office.

Dated this 10<sup>th</sup> day of May, 2010.



GARY SPACKMAN  
Interim Director


# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of May, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 2139 Boise, ID 83701 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</a> <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83339 <a href="mailto:tarkoosh@capitollawgroup.net">tarkoosh@capitollawgroup.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 <a href="mailto:wkf@pmt.org">wkf@pmt.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Candice M. McHugh RACINE OLSON 101 Capitol Blvd., Ste. 208 Boise, ID 83702 <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 <a href="mailto:rcb@racinelaw.net">rcb@racinelaw.net</a> <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email



David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 1961 Stout Street, 8 <sup>th</sup> Floor Denver, CO 80294 <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 <a href="mailto:mhoward@pn.usbr.gov">mhoward@pn.usbr.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Sarah A. Klahn WHITE JANKOWSKI 511 16 <sup>th</sup> St., Ste. 500 Denver, CO 80202 <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 <a href="mailto:mcc@givenspursley.com">mcc@givenspursley.com</a> <a href="mailto:jcf@givenspursley.com">jcf@givenspursley.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 <a href="mailto:lyle.swank@idwr.idaho.gov">lyle.swank@idwr.idaho.gov</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Allen Merritt Cindy Yenter IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 <a href="mailto:allen.merritt@idwr.idaho.gov">allen.merritt@idwr.idaho.gov</a> <a href="mailto:cindy.yenter@idwr.idaho.gov">cindy.yenter@idwr.idaho.gov</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

  
Victoria Wigle  
Administrative Assistant to the Director

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER )	
TO VARIOUS WATER RIGHTS HELD BY OR FOR )	Docket No. CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>ORDER DENYING IGWA'S</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>REQUEST FOR STAY AND/</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>OR EXTENSION OF TIME;</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>ORDER GRANTING REQUEST</b>
AND TWIN FALLS CANAL COMPANY )	<b>FOR RECONSIDERATION AND</b>
)	<b>HEARING; ORDER</b>
)	<b>AUTHORIZING DISCOVERY,</b>
)	<b>IN PART; and NOTICE OF</b>
)	<b>HEARING</b>
)	

On May 6, 2010, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed its *Motion for Reconsideration, Motion for Stay, Motion to Conduct Discovery, Motion for Immediate Action, and Request for Hearing* ("Motion") with the Director of the Department of Water Resources ("Director" or "Department"). In this order, the Director will respond to each request.

**Request for Stay and/or Extension of Time**

On April 29, 2010, the Director issued his *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 & 4)* ("April Forecast Supply Order"). In the April Forecast Supply Order, the Director found that certain members of the Surface Water Coalition ("SWC") were likely to suffer material injury during the 2010 irrigation season and required IGWA to provide evidence, to the satisfaction of the Director, that IGWA had secured the necessary volume of water to mitigate for the predicted material injury. The April Forecast Supply Order stated that, by May 13, 2010, if IGWA could not demonstrate that it had secured the required volume of water, in whole or in part, the Director would issue an order curtailing junior ground water rights. IGWA requests that the Director stay enforcement of this action until a hearing is held and a final order is entered on the Director's April 8, 2010 *Final Order Regarding Methodology for Determining Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order") and IGWA's mitigation plan for the SWC.

The Methodology Order established deadlines for the Director and the parties to follow in order to provide certainty regarding water supply at the start of the irrigation season. The April

Attachment 6

Forecast Supply Order applied Steps 3 and 4 of the Methodology Order (*see* page 34) and predicted a demand shortfall of 84,300 acre-feet to certain members of the SWC. It is incumbent upon IGWA to provide evidence, to the satisfaction of the Director, by May 13, 2010, regarding the amount of water secured to mitigate for material injury to members of the SWC. Therefore, the Director will not grant IGWA's request for stay, nor will the Director grant IGWA's request to extend the May 13, 2010 deadline into the future.

### **Request for Reconsideration and Request for Hearing**

The April Forecast Supply Order provided for reconsideration and a hearing if so requested. The Director grants IGWA's request for reconsideration and will order a hearing. The scope of the hearing shall be limited to whether the April Forecast Supply Order followed Steps 3 and 4 of the Methodology Order (*see* page 34).

### **Request for Discovery**

In its Motion, IGWA seeks to depose two Department employees, Tony Olenichak and Lyle Swank, on May 13, 2010 in Idaho Falls. IGWA states "[t]hese depositions are necessary for the Ground Water Users to properly address the Methodology Order and the [April Forecast Supply Order]." *Motion* at 5. In conjunction with its Motion, IGWA served a *Notice of Deposition Duces Tecum of Lyle Swank and Anthony Olenichak* upon the Department ("Notice of Deposition").

Neither Mr. Olenichak nor Mr. Swank were involved in applying Steps 3 and 4 in the April Forecast Supply Order. Therefore, the Director will deny IGWA's request to depose Mr. Olenichak and/or Mr. Swank and quash its Notice of Deposition. The Director will however authorize IGWA's request for discovery regarding whether the Director, in the April Forecast Supply Order, followed Steps 3 and 4 of the Methodology Order. Again, the scope of the hearing on this issue is limited to whether the April Forecast Supply Order followed Steps 3 and 4 of the Methodology Order (*see* page 34). The Department will make Mathew Weaver available for deposition relative to the limited scope of whether the Director, in the April Forecast Supply Order, followed Steps 3 and 4 of the Methodology Order. Mr. Weaver shall be available for deposition at the Department's State Office in Boise, Idaho.

On May 7, 2010, the Department received a *Request for Hearing on Motion and Request for Status Conference* from the SWC. The SWC states that it objects "to conducting discovery in a completed record." While the Director will authorize discovery concerning the April Forecast Supply Order for the limited purpose of determining whether Steps 3 and 4 of the Methodology Order were followed, the Director denies IGWA's request to authorize discovery in the Methodology Order.

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

1. The Director DENIES IGWA's request for stay and/or extension of time. IGWA must demonstrate by May 13, 2010, the amount of water it has secured relative to the Director's finding of material injury.
2. The Director GRANTS IGWA's request for reconsideration and hearing regarding the April Forecast Supply Order.
3. The Director DENIES IGWA's request to depose Tony Olenichak and Lyle Swank and quashes its Notice of Deposition of Mr. Olenichak and Mr. Swank.
4. The Director GRANTS IGWA's request to authorize discovery, for the limited purpose, of whether the April Forecast Supply Order followed Steps 3 and 4 of the Methodology Order.
5. The Director DENIES IGWA's request to authorize discovery regarding the Methodology Order.


IT IS FURTHER ORDERED as follows:

That the Director will make available Mathew Weaver for deposition relative to the limited scope of whether the Director, in the April Forecast Supply Order, followed Steps 3 and 4 of the Methodology Order. Mr. Weaver shall be available for deposition at the Department's State Office in Boise, Idaho.

IT IS FURTHER ORDERED as follows:

A hearing on the limited issue of whether the April Forecast Supply Order followed Steps 3 and 4 of the Methodology Order shall commence immediately following conclusion of the May 24, 2010 hearing on 2008 data in the Methodology Order.

Dated this 10<sup>th</sup> day of May, 2010.

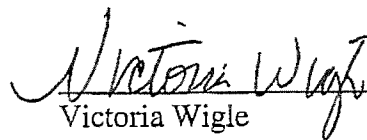
  
GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of May, 2010, the above and foregoing, was served by the method indicated below, and addressed to the following:

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